No. 14258

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY COMPANY, a Corporation, and E. F. GRANDY, INC.,
Appellants,

vs.

AMERICAN SEATING COMPANY, a Corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

No. 14258

United States
Court of Appeals
for the Ninth Circuit

GLENS FALLS INDEMNITY COMPANY, a Corporation, and E. F. GRANDY, INC.,
Appellants,

vs.

AMERICAN SEATING COMPANY, a Corporation,
Appellee.

Transcript of Record

Appeal from the United States District Court for the Southern District of California, Central Division

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, California

INDEX

[Clerk's Note: When deemed likely to be of important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

McCALL & McCALL and
ALBERT LEE STEPHENS, Jr.,

458 S. Spring Street,
Los Angeles 13, California.

For Appellee:

WOLFSON & ESSEY,
IRVING H. GREEN,

121 South Beverly Drive,
Beverly Hills, California. [1*]

---

*Page numbering appearing at bottom of page of original certified Transcript of Record.

In the District Court of the United States, Southern District of California, Central Division

No. 14305-T.

AMERICAN SEATING COMPANY, a New Jersey Corporation, Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a New York Corporation, E. F. GRANDY, INC., a California Corporation, and FARMERS & MERCHANTS BANK OF LONG BEACH, a California Corporation, Defendants.

COMPLAINT

Plaintiff for its cause of action against defendants and each of them, alleges:

I.

That the plaintiff is a corporation duly organized under the laws of the State of New Jersey and is duly qualified to do business in the State of California.

II.

That the defendant, Glens Falls Indemnity Company, is a New York corporation duly organized under the laws of the State of New York and doing business in the State of California.

That the defendant, E. F. Grandy, Inc., is a California corporation duly organized under the laws of the State of California and doing business in the State of California. [2]

That the defendant, Farmers & Merchants Bank of Long Beach, is a California corporation duly organized under the laws of the State of California and doing business in the State of California.

III.

That diversity of citizenship exists between all the parties plaintiff and all the parties defendant, and that the amount in controversy is in excess of $3,000.00.

IV.

That on or about the 29th day of April, 1949, the defendant, E. F. Grandy, Inc., had entered into a written contract or authorization dated April 29, 1949, in which said E. F. Grandy, Inc., agreed to act as General Contractor for the performance of work known and described as conversion of Building IS-16, U. S. Naval Ammunition and Net Depot, Seal Beach, California, under what was known as project NO6-16752, Spec. 20656, with the United States Government.

V.

That on or about the 4th day of May, 1949, said E. F. Grandy, Inc., as General Contractor, entered into a written contract with one V. L. Murphy, which contract was designated as "Sub-Contract" by the terms of which said V. L. Murphy, as Subcontractee, was to furnish all materials, labor, tools, machinery, equipment, light, power, water or other things necessary to perform and complete the plumbing and piping portion of the work as described by Section 17, Spec. 20656 Y & D Drawings

No. 417042 through 417055; that the contract price on said sub-contract was the sum of $16,667.05; that said sub-contract provided that the Subcontractee shall furnish to the Contractor a Performance or Completion Bond, which Bond was furnished by said Subcontractee in the principal sum of $16,667.05, with the defendant, Glens Falls Indemnity Company, a New York corporation, as Surety and [3] that said Performance Bond was executed by said corporation in writing on the 18th day of May, 1949, conditioned as follows:

"The condition of this obligation is such, that whereas the Obligee entered into a certain contract, with the Government, dated April 29, 1949, for conversion of Bldg. IS-16, U. S. Naval Ammunition & Net Depot, Seal Beach, California, NO6-16752, Specification 20656 and,

"Whereas, said Principal entered into a written subcontract on the 4th day of May, 1949, with E. F. Grandy, Inc., for Plumbing and Piping; per Section 17, Specification 20656, Y & D Drawings No. 417042 thru 417055.

"Now Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by the Government, with or without notice to the Surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and

all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue."

That on the 18th day of May, 1949, the said Subcontractee, V. L. Murphy, as principal, and Glens Falls Indemnity Company, a New York Corporation, as Surety, executed in writing a payment bond running to the defendant, E. F. Grandy, Inc., in the penal sum of $8,833.58, conditioned as follows:

"The Condition of This Obligation Is Such, that whereas the said Obligee entered into a certain contract with the Officer-in-Charge of Construction, U. S. Naval Base, Los Angeles, for the United States Government, dated April 29, 1949, for Conversion of Bldg. IS-16 U. S. Naval Ammunition & Net Depot, Seal Beach, Calif. NO6-16752, Specification 20656.

"Whereas, said Principal on the 4th day of May, 1949 entered into a written subcontract agreement with E. F. Grandy, Inc. for Plumbing and Piping; per Section 17, Specification 20656, Y & D Drawings No. 417042 thru 417055.

"Now Therefore, If the Above Principal shall indemnify and hold the said Obligee free and harmless from and against all loss and damage by reason of its failure to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect."

VI.

That the defendants, E. F. Grandy, Inc., and Glens Falls Indemnity Company, knew or in the exercise of reasonable [5] care should have known that in order for said V. L. Murphy to carry out his contract as afore-alleged, it would be, and was necessary for him to purchase and obtain supplies and materials from this plaintiff, and that the foregoing performance bond and payment bond were written in part for the protection of this plaintiff, to the extent of plaintiff's claim as made herein.

VII.

That on or about the 1st day of June, 1949, the plaintiff, American Seating Company, under and pursuant to agreement with said V. L. Murphy, which said agreement was approved by the defendant, E. F. Grandy, Inc., furnished certain goods, wares and materials commonly described as a chemical sink, and equipment which were installed on said project and that said goods, wares and equipment were of the reasonable worth and value and of the contract price of $6,124.37.

VIII.

That said E. F. Grandy, Inc., received payment from the United States Government for the materials furnished by the plaintiff and certified to the United States Government that said materials had been paid for.

IX.

That said V. L. Murphy has failed and refused

to pay to the plaintiff the reasonable worth and value and contract price for said materials which were furnished to and used on said project, and that said E. F. Grandy, Inc., has failed and refused to pay the same, and that said defendant, Glens Falls Indemnity Company, has failed and refused to pay the same.

X.

On or about the 23rd day of May, 1949, V. L. Murphy assigned all of the proceeds due him under said subcontract dated May 4, 1949, to the defendant, Farmers & Merchants Bank of [6] Long Beach, and that said assignment was accepted by the defendant, E. F. Grandy, Inc., without notice of said assignment or said acceptance being given to the plaintiff, although the defendants, E. F. Grandy, Inc., and Farmers & Merchants Bank of Long Beach, knew or in the exercise of reasonable care should have known that said V. L. Murphy, in order to fulfill his contract, would be required to purchase from the plaintiff certain materials as hereinafter described for use in fulfilling and completing said sub-contract.

XI.

Plaintiff alleges upon information and belief that said E. F. Grandy, Inc., did pay to the defendant, Farmers & Merchants Bank of Long Beach, the sum of $6,124.34 without requiring said V. L. Murphy to furnish them with any evidence showing that the materials so furnished by the plaintiff had been paid for to the plaintiff.

XII.

That said defendant, Farmers & Merchants Bank of Long Beach, received from E. F. Grandy, Inc., the sum of $6,124.37 as trustee for the plaintiff, and has failed, refused and neglected to pay said sum to the plaintiff, although past due and demanded.

Wherefore, plaintiff prays judgment against the defendants, and each of them, in the sum of $6,-356.00, together with interest thereon at the rate of seven (7%) per cent per annum from the 1st day of June, 1949, until paid, for its costs of suit herein, and for such other and further relief as to the Court may seem proper.

WOLFSON & ESSEY,
/s/ By BURNETT L. ESSEY,
Attorneys for Plaintiff. [7]

[Endorsed]: Filed July 2, 1952.

[Title of District Court and Cause.]

ANSWER TO COMPLAINT

Comes now defendant Glens Falls Indemnity Company, a corporation, for itself alone and not for its co-defendants nor any of them, and in answer to plaintiff's complaint admits, denies and alleges:

I.

Admits Paragraphs I, II, III, IV and V of the complaint.

II.

This defendant denies the allegations contained in Paragraph VI of plaintiff's complaint.

III.

This defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the [12] allegations contained in Paragraphs VII, VIII, IX, X, XI or XII of plaintiff's complaint, except this defendant admits that it refused to pay plaintiff's claim.

For a Further, Separate, Affirmative Defense, This Answering Defendant Alleges:

I.

The complaint of plaintiff herein fails to state a claim against this defendant upon which relief can be granted.

Wherefore, defendant demands that the Court discharge defendant from all liability in the premises and award to defendant its costs.

Dated: August 6, 1952.

/s/ JOHN E. McCALL,
Attorney for Defendant.

Glens Falls Indemnity Company, a New York Corporation. [13]

Affidavit of Service by Mail attached. [14]

[Endorsed]: Filed August 6, 1952.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES UNDER RULE 33

Now comes defendant Glens Falls Indemnity Company, a New York Corporation, by Roy O. Samson, who, having been duly sworn in response to the interrogatories served upon defendant in the above case makes the following answers and responses:

"1. Did your company receive any written application from either V. L. Murphy or E. F. Grandy, Inc., before or at the time you issued the Payment Bond dated May 18, 1949, referred to in Paragraph V of plaintiff's complaint?"

Answer: Yes. From V. L. Murphy.

"2. If such written application was obtained by you, please attach a copy thereof to your answers to these interrogatories." [19]

"3. Were you furnished with a copy of Section 17, Specification No. 20656, Y & D Drawings No. 417042 through 417055 of United States Government contract with E. F. Grandy, Inc., dated April 29, 1949, for conversion of Building IS-16, United States Naval Ammunition and Net Depot, Seal Beach, California?

Answer: No.

"4. If you did not receive such a copy, what effort did you make to obtain the same?

Answer: None.

"5. If you did receive such a copy, did such

copy indicate that V. L. Murphy would be required to obtain materials for the chemical sink provided in such specification from a material supplier?"

Answer: None received.

"6. Did V. L. Murphy post any security of any kind, or deposit any security of any kind, with your company before or at the time of the issuance of said Payment Bond of May 18, 1949, referred to in Paragraph V of plaintiff's complaint?"

Answer: No.

"7. If the answer to the previous question is in the affirmative, what security did you receive from V. L. Murphy, or anyone on his behalf, and do you still retain such security?"

Answer: None.

"8. Did your company receive from the American Seating Company a letter dated December 1, 1950, making demand for payment from you under the provisions of the Payment Bond referred to in Paragraph V of plaintiff's complaint?"

Answer: Yes.

"9. Who is B. McGee and what position did he or she have with your company on December 2, 1950?"

Answer: Telephone operator. [20]

"10. Did your company receive a letter from the American Seating Company dated December 22, 1950, concerning payment under the provisions of said Payment Bond?"

Answer: Yes.

"11. Did your company write and send a letter to the American Seating Company dated Janu-

ary 3, 1951, signed by Roy O. Samson concerning claim made under this bond?"

Answer: Yes.

"12. Who is Roy O. Samson and what connection did he have with your company on January 3, 1951?"

Answer: Adjuster.

"13. Did your company make an investigation concerning the non-payment to the plaintiff by V. L. Murphy or E. F. Grandy, Inc., for the materials furnished by the plaintiff under the contract referred to in Paragraph V of plaintiff's complaint?"

Answer: No.

"14. If your answer to the foregoing question is in the affirmative, what is the name and present address of the person or persons making such investigation?"

Answer: None made.

"15. Has your company had any correspondence with E. F. Grandy, Inc., or V. L. Murphy concerning the Payment Bond executed by your company on the 18th day of May, 1949, and referred to in Paragraph V of plaintiff's complaint?"

Answer: Have received no letter or other correspondence from E. F. Grandy, Inc., or V. L. Murphy concerning the Payment Bond.

"16. If the answer to the foregoing question is in the affirmative, please attach copies of all of

such correspondence to [21] your answers to these interrogatories."

Answer: None received.

Dated this 22nd day of August, 1952.

/s/ ROY O. SAMSON

State of California,
County of Los Angeles—ss.

Subscribed and sworn to before me this 22nd day of August, 1952.

[Seal] /s/ JOHN E. McCALL,
Notary Public in and for the above County and State. My commission expires April 9, 1955.

Affidavit of Service by Mail attached. [23]

[Endorsed]: Filed August 23, 1952.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT E. F. GRANDY, INC.

Comes now the defendant E. F. Grandy, Inc., a California corporation, for itself alone and not for its co-defendants, nor any of them, and in answer to plaintiff's complaint admits, denies and alleges:

I.

Admits paragraphs I, II, III, IV and V of the complaint.

II.

This defendant denies the allegations contained in paragraph VI of plaintiff's complaint.

III.

Answering paragraph VII, this defendant admits that V. L. Murphy, as subcontractor, installed certain material and supplies in a building known as U. S. Naval Ammunition & Net Depot at Seal Beach, California, wherein the United States Government was the [28] owner, and this defendant the prime contractor, and V. L. Murphy the subcontractor. This defendant denies all other allegations in paragraph VII.

IV.

Answering paragraphs VIII and IX, this defendant admits that it has not paid to the plaintiff, American Seating Company, $6,124.37, or any other sum, and alleges that it paid said sum to V. L. Murphy, the subcontractor, and admits that it received all moneys due from the United States Government on said contract. This defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the other allegations contained in paragraphs VIII or IX of plaintiff's complaint.

V.

Answering paragraph X, this defendant admits that on or about the 23rd day of May, 1949, V. L. Murphy assigned the proceeds due him under said

subcontract to Farmers & Merchants Bank of Long Beach, California, and that pursuant to said assignment this defendant paid over all the money which thereafter became due V. L. Murphy, subcontractor, to the asignee, Farmers & Merchants Bank of Long Beach. This defendant denies all other allegations in paragraph X.

VI.

Answering paragraphs XI and XII, this defendant admits that he paid over to Farmers & Merchants Bank of Long Beach $6,124.37 as assignee of V. L. Murphy. This defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the other allegations in paragraphs XI and XII.

For a Further Second and Affirmative Defense, This Answering Defendant Alleges:

I.

The complaint of plaintiff herein fails to state a claim [29] against this defendant upon which relief can be granted.

Wherefore, this defendant demands that the Court discharge defendant from all liability in the premises and award to defendant its costs.

Dated: October 21, 1952.

/s/ JOHN E. McCALL,
Attorney for Answering
Defendant. [30]

Duly Verified.

Affidavit of Service by Mail attached. [31]

[Endorsed]: Filed October 22, 1952.

[Title of District Court and Cause.]

ANSWER TO INTERROGATORIES UNDER RULE 33

Now comes defendant E. F. Grandy, Inc., a California Corporation, by E. F. Grandy, who, having been duly sworn in response to the interrogatories served upon defendant in the above case, makes the following answers and responses:

"1. What is the name and present address of the officer of your corporation in charge of the project covered by the contract with the United States Government for the conversion of building IS-16 U. S. Naval & Ammunition Net Depot, Seal Beach, California?"

Answer: E. F. Grandy, President, 243 Broadway, Laguna Beach.

"2. What is the name and present address of the officer of your corporation who entered into the subcontract with V. L. Murphy, referred to in plaintiff's complaint?" [44]

Answer: E. F. Grandy, President, 243 Broadway, Laguna Beach.

"3. What is the name and present address of all employees engaging in correspondence with V. L. Murphy in connection with this contract?"

Answer: No one in the E. F. Grandy organization is engaging in correspondence with V. L. Murphy.

"4. Did the plaintiff American Seating Company furnish in connection with the building project referred to in plaintiff's complaint, certain material

and supplies of the agreed price and reasonable value of $6,124.37?"

Answer: The American Seating Company furnished to V. L. Murphy certain materials of the reasonable value of $61.37 [$6124.37*] but affiant does not know the agreed price with Murphy.

"5. Did American Seating Company furnish any materials, supplies or equipment which were installed in connection with the contract you had with the United States Government, known and described as Project No. 6-16752 [NOy16752*] Spec. 2-656 [20656*]?" Answer: Yes.

"6. If your answer is in the affirmative to the foregoing question, what materials and supplies or equipment did American Seating Company furnish or supply, which was installed in the project above referred?"

Answer: Three pieces of equipment, (a) a chemical sink, (b) a chemical table, and (c) a chemical fume hood.

"7. What was the agreed price and/or the market value of said material and supplies?"

Answer: Affiant does not know.

"8. Did your company receive a copy of the purchase order sent to American Seating Company under date of September 23, 1949, by V. L. Murphy, for the materials and supplies furnished by American Seating Company in connection with the construction of the project referred to?" [45]

Answer: Not to my knowledge, as it cannot be found in my file.

---

* Pencil figures.

"9. Did you send a letter to the officer in charge of construction of this project for copies of the purchase order from V. L. Murphy to American Seating Company, for the chemical laboratory equipment which was furnished by it and installed in said project?"

Answer: Not that I remember, and none shows in my records.

"10. On what date did you make payment to V. L. Murphy and/or to his assigns for the work done pursuant to the subcontract of May 4, 1949?"

Answer: All payments made to Farmers & Merchants Bank of Long Beach under assignment by V. L. Murphy.

"11. Did you pay Murphy for his work before the materials and supplies furnished by American Seating Company were installed on the project?"

Answer: No.

"12. When did Murphy complete the work required of him under his subcontract with you? Please give date."

Answer: Date not in my records.

"13. Did you inspect the work performed by V. L. Murphy and, if so, who made the inspection? Give name and present address and date upon which such inspection was made."

Answer: Affiant looked over work from time to time, but Navy made final inspection.

"14. Who inspected the chemical sink and laboratory which was furnished by the plaintiff in connection with this project? Please give name and

present address of such inspector and date upon which such inspection was made."

Answer: Representatives of the Navy. Do not have date nor address of Inspector.

"15. Were you ever notified by Mr. V. L. Murphy, in writing [46] or otherwise, that he had paid American Seating Company for the materials and supplies furnished by it? If so, please advise whether orally or in writing. If orally, who had the conversation and, if in writing, please attach a copy of the writing."

Answer: No.

"16. Have any other claims been made against you by any material men or suppliers arising out of this same contract? If so, please give names, addresses and amounts of claim."

Answer: None.

"17. Was any investigation made by you prior to paying V. L. Murphy or his assigns as to whether or not American Seating Company had been paid for the materials and supplies furnished by it?"

Answer: No.

"18. If such investigation was made, give name and address of the person making such investigation, the date or dates when the investigation was made, and whether or not any written report of any kind was made in connection with said investigation?"

Answer: At question 17.

"19. What are the names and present addresses of any officers of the corporation or active managers for the corporation who are familiar with

the circumstances surrounding the contract with V. L. Murphy and the contract with the United States Government?"

Answer: Affiant, E. F. Grandy.

"20. Did you certify to the United States Government that all subcontractors and all material and supplies had been paid for?"

Answer: No.

"21. Do you admit that you have refused to pay to the American Seating Company, and still refuse to pay to the American Seating Company, the value of the material and supplies furnished by it in connection with said contract?"

Answer: Yes. [47]

"22. When did the United States Government accept the completed project?"

Answer: About June, 1950.

"23. When did the United States Government pay you in full for your contract? If payments were made in installments, state the time and amount of each installment.

Answer: Final payment made about June, 1950.

"24. When did you first receive notice from the plaintiff that it had not been paid for the materials and supplies it furnished? In what form did you receive this notice?"

Answer: In the latter part of 1950, after Murphy had been paid in full—by telephone.

"25. Did you ever give American Seating Company notice of the fact that the moneys to be paid by you to V. L. Murphy under his subcontract had been assigned by V. L. Murphy to the Farmers &

Merchants Bank of Long Beach? If you gave such notice, was it in writing and, if so, attach copy of the writing."

Answer: No.

"26. What is the name and present address of the person or persons employed by your company who were responsible for paying to Murphy or his assigns amounts due under his subcontract?"

Answer: E. F. Grandy, President.

"27. What was your purpose in requiring V. L. Murphy to furnish you with a bond in the sum of $8,833.58?"

Answer: For protection in the event of loss to me.

"28. How was the amount of $8,833.58 arrived at in determining the penal sum of the bond to be furnished by Murphy to you?"

Answer: Fifty per cent of subcontract.

"29. What is the name and present address of the person or persons who made the calculations which resulted in the determination that the bond should be in the sum of $8,833.58?"

Answer: E. F. Grandy. [48]

"30. In determining the price to be paid to subcontractor V. L. Murphy under the subcontract dated May 4, 1949, how was the price of $16,667.05 arrived at?"

Answer: Same amount as firm bid submitted by Murphy.

"31. How much of the contract of May 4, 1949 was for labor, and how much was for material?

What portion of the contract contemplated the installation of materials? What materials were provided for in the specifications to be furnished in connection with fulfilling the subcontract by V. L. Murphy?"

Answer: Not separated; same as installed by Murphy.

"32. In the contract of May 4, 1949, with V. L. Murphy, it provided that the subcontractor was to perform the following portion of the work: "Plumbing and piping" per Section 17, Spec. 20656, Y & D Drawings No. 417042 through 417055. Please state the provisions of said Section, Specification and Drawing numbers."

Answer: Section 17, in general, provided for the procurement and installation of plumbing material and pertinent piping; certain chemical laboratory equipment and the labor for installation.

"33. Did you consent in writing to the assignment of the moneys due under the subcontract to V. L. Murphy, to the Farmers & Merchants Bank of Long Beach, California? If you gave such consent, when did you give it and was it in writing? If in writing, attach copy of the written consent to your answers to these interrogatories.

Answer: Yes—May 23, 1949, in writing, as per attached copy.

Dated: December 5, 1952.

/s/ E. F. GRANDY

Subscribed and sworn to before me this 5th day of December, 1952.

[Seal] /s/ W. REX HOOVER,
Notary Public in and for the County of Orange, State of California. My commission expires November 4, 1953. [49]

We herewith acknowledge receipt of assignment of V. L. Murphy's Sub-Contract, dated May 4, 1949, for Plumbing and Piping, under our prime Contract NOy-16752 for Conversion of Building IS-16 to Quality Control Surveillance Laboratory at the U. S. Naval Ammunition & Net Depot, Seal Beach, California, subject to such revisions as may be required during construction.

All payments due under above described Sub-Contract will be made direct to the Farmers and Merchants Bank of Long Beach, 302 Pine Avenue, Long Beach, California, attention J. B. Ivey, Vice President.

Dated.....

E. F. GRANDY, INC.,
By .....

State of California,
County of Los Angeles—ss.

Geraldine M. Boice, being first duly sworn, says: That affiant is a citizen of the United States and a resident of the County of Los Angeles; that affiant is over the age of eighteen years and is not a party to the within and above entitled action; that affiant's

business address is: Room 920, Rowan Building, 458 South Spring Street, Los Angeles 13, California; that on the ... day of December, 1952, affiant served the within Answer to Interrogatories on the Plaintiff in said action, by placing a true copy thereof in an envelope addressed to the attorneys of record for said Plaintiff at the office address of said attorneys, as follows: Wolfson & Essey and Irving H. Green, Attorneys at Law, 121 South Beverly Drive, Beverly Hills, California, and by then sealing said envelope and depositing the same, with postage thereon fully prepaid, in the United States mail at Los Angeles, California, where is located the office of the attorneys for the person.. by and for whom said service was made.

That there is delivery service by United States mail at the place so addressed and there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ GERALDINE M. BOICE

Subscribed and sworn to before me this 8th day of December, 1952.

[Seal] /s/ JOHN E. McCALL,
Notary Public in and for the County of Los Angeles, State of California. [50]

[Endorsed]: Filed December 9, 1952.

[Title of District Court and Cause.]

ANSWER TO REQUEST FOR ADMISSIONS TO RULE 36

Now comes defendant E. F. Grandy, Inc., a California Corporation, by E. F. Grandy, who, having been duly sworn in response to the interrogatories served upon defendant in the above case, makes the following answers and responses:

"1. That on September 23, 1949, V. L. Murphy forwarded a purchase order to the plaintiff, American Seating Company, for (1) the center table of the agreed price of $3392.00, (2) two No. S-1817X units of the agreed price of $2482.00 and (3) for a sink and peg board of the agreed price of $482.00."

Answer: No. Have no information on either (1), (2) or (3).

"2. That under date of September 26, 1949, the defendant [51] E. F. Grandy, Inc., sent four copies of said purchase order to the officer in charge of construction, U. S. Naval Base, Los Angeles, Long Beach, California."

Answer: Affiant remembers forwarding a purchase order, but does not remember date.

"3. That the defendant, E. F. Grandy, Inc., knew that in connection with its sub-contract with V. L. Murphy, which is the subject of this law suit, that V. L. Murphy purchased and installed materials and supplies in the building known as U. S. Naval Ammunition and Net Depot at Seal Beach,

California, and that the same was purchased from the American Seating Company and was of the agreed price of $6,124.37.

Answer: No. Did not know agreed price, if any, but did know source of equipment.

"4. That the purpose of requiring V. L. Murphy to furnish the payment bond referred to in plaintiff's complaint was obtained for the purpose of protecting the defendant, E. F. Grandy, Inc., and any suppliers and material man from any loss due to the failure of V. L. Murphy to pay such material man or suppliers.

Answer: Affiant's purpose in securing the payment bond was to protect E. F. Grandy, Inc., and no one else, against loss.

"5. That the defendant, E. F. Grandy, Inc., is indebted to the plaintiff in the sum of $6,124.37 for the materials furnished by the plaintiff in connection with the conversion of Building IS-16 U. S. Naval and Ammunition Net Depot, Seal Beach, California.

Answer: No. Not indebted to plaintiff in any sum.

"6. That Glens Falls Indemnity Company is defending the present action for and on behalf of the defendant, E. F. Grandy, Inc."

Answer: The attorney for my surety, Glens Falls Indemnity Company, is defending this defendant E. F. Grandy, Inc.

"7. That Glens Falls Indemnity Company has agreed with the [52] defendant, E. F. Grandy, Inc., that it will pay any judgment obtained by the plain-

tiff against the defendant, E. F. Grandy, Inc., in this action under the provisions of the bond as alleged in plaintiff's complaint."

Answer: No such agreement.

Dated: December 5, 1952.

/s/ E. F. GRANDY

Subscribed and sworn to before me this 5th day of December, 1952.

[Seal] /s/ W. REX HOOVER,
Notary Public in and for the County of Orange, State of California. My Commission expires November 4, 1953. [53]

Affidavit of Service by Mail attached. [54]

[Endorsed]: Filed December 9, 1952.

[Title of District Court and Cause.]

MEMORANDUM BRIEF OF DEFENDANT FARMERS AND MERCHANTS BANK OF LONG BEACH

Statement of Essential Facts

Defendant, Farmers and Merchants Bank of Long Beach, is a banking corporation, authorized to do business under the Laws of the State of California. Part of its business is the lending of its funds to borrowers, taking as evidence of said loans Notes, some of which are secured and some of which are unsecured.

On or about May 23, 1949, V. L. Murphy, being the same person as the V. L. Murphy described

in plaintiff's Memorandum Brief, being already indebted to defendant Bank for loans and advances made to him in the amount of $10,000.00, and in consideration of future loans which he, the said V. L. Murphy, required, and to secure said past loans and future advances, [65] assigned in writing to the Defendant Bank all of his right, title, interest and demand in all monies due or to become due, when and as the said monies shall have accrued, pursuant to the terms of a Sub-Contract dated May 4, 1949, by and between V. L. Murphy and E. F. Grandy, Inc., covering plumbing and piping, per Section 17 Spec. 20656, Y & D Drawings No. 417042 through 417055, with full authority to collect and receipt for the same.

Thereafter, Defendant Bank loaned to the said V. L. Murphy sums of money in excess of $46,000.00, and received from E. F. Grandy, Inc., pursuant to the Assignment above mentioned, at least the sum of $15,426.04, which amount was paid in installments at various dates, and was credited by defendant Bank on the indebtedness due it from the said V. L. Murphy. Several other credits appear on the account of V. L. Murphy, but defendant Bank cannot at this time identify whether or not said E. F. Grandy, Inc., has paid a total amount to it of $16,667.05.

Defendant Bank had no notice nor knowledge that V. L. Murphy intended to or actually did purchase any material from plaintiff, and at no time had any knowledge, until the filing of this suit,

that V. L. Murphy was indebted to plaintiff. [66]
* * * * *

Affidavit of Service by Mail attached. [68]

[Endorsed]: Filed February 3, 1953.

[Title of District Court and Cause.]

PRE-TRIAL BRIEF OF DEFENDANTS GLENS FALLS INDEMNITY COMPANY AND E. F. GRANDY, INC.

Statement of Facts

On or about the 29th day of April, 1949, defendant E. F. Grandy, Inc., as prime contractor, entered into a written contract in the sum of $100,315.00 with the United States Government for the construction of certain work at the United States Naval Ammunition and Net Depot at Seal Beach, California, and posted with the United States Government a Performance Bond and a Labor and Materials Bond, as required by an act of the Congress known as the "Miller Act", Sections 270a and 270b, Title 40, United States Codes Annotated.

On or about the 4th day of May, 1949, defendant E. F. Grandy, Inc., entered into a written subcontract in the sum of $16,667.05 [70] with one V. L. Murphy, a plumbing contractor, to do a portion of the work required by the prime contract with the United States Government. V. L. Murphy posted with E. F. Grandy, Inc., a Performance Bond and

a Payment Bond with defendant Glens Falls Indemnity Company as surety to protect it, E. F. Grandy, Inc., in the event it suffered a loss by reason of the subcontract.

All of the work under the prime contract of E. F. Grandy, Inc., including the work of V. L. Murphy under the subcontract, was completed and was accepted by the Government on or about the ... day of June, 1950. E. F. Grandy, Inc., was paid in full by the Government and V. L. Murphy, and his assignee, the Farmers & Merchants Bank of Long Beach, California, were paid in full by E. F. Grandy, Inc., on or about the 19th day of July, 1950.

On or about the 9th day of February, 1951, the plaintiff herein, American Seating Company, filed in the Superior Court of Los Angeles County, Case No. 582-886, a complaint against V. L. Murphy, and on the 6th day of March, 1952 was awarded judgment against V. L. Murphy in the sum of $6,681.78 for the same materials mentioned in this suit.

This suit which named E. F. Grandy, Inc., the Glens Falls Indemnity Company, and the Farmers & Merchants Bank of Long Beach as defendants, was commenced in this Court on or about July 2, 1952.

* * * * * [71]

[Endorsed]: Filed March 5, 1953.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: April 1, 1953. At: Los Angeles, Calif.

Present: The Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Fred Sherry.

Counsel for Plaintiff: Irving H. Green.

Counsel for Defendants: John E. McCall for defendant Glens Falls Indemnity Co. and E. F. Grandy, Inc. M. W. Horn for defendant Farmers & Merchants Bank.

Proceedings: For pretrial. (In Chambers).

Plf's Ex. 1 to 16 incl, are marked for ident.

Pursuant to stipulation of counsel It Is Ordered that photo copies of exhibits may be used in lieu of the originals.

It Is Ordered that facts as stipulated to by counsel, and exhibits introduced, may be deemed the evidence in this case, except those exhibits which counsel for defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc., will determine as to their genuineness, and so advise the Court by letter.

Counsel for plaintiff states he will submit the case on those briefs already filed.

It Is Ordered that either party may file additional briefs twenty days after receipt of a copy of the transcript of the hearing this day, and have ten days thereafter in which to file any reply briefs.

It Is Further Ordered that in the event counsel

do not desire to submit the cause upon the filing of briefs, that trial will be had on May 8, 1953, at 2 p.m., as to defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc.

Trial as to defendant Farmers & Merchants Bank will be severed and date of trial as to said defendant will be fixed after determination of the case as to defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc.

Provided that the case proceeds to trial as to defendant Farmers & Merchants Bank, plaintiff is ordered to give said defendant ten days notice.

EDMUND L. SMITH, Clerk.
/s/ WM. A. WHITE, Deputy Clerk. [83]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: May 8, 1953. At: Los Angeles, Calif.

Present: The Hon: Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Fred Sherry.

Counsel for Plaintiff: Irving H. Green.

Counsel for Defendants: John E. McCall; George Sturr; for Glens Falls Indemnity Co. and E. F. Grandy, Inc.

Proceedings: For trial as to def'ts Glens Falls Indemnity Co. and E. F. Grandy, Inc.

All parties present. Court orders trial proceed.

Plf's Ex. 17 is received in evidence.

Defts' Ex. A, B, and C are received in evidence.

Plaintiff moves the Court for leave to amend prayer of complaint.

Court orders that prayer of complaint may be amended by interlineation.

Plaintiff rests. Defendants rest.

Plf's Ex. 2 to 8 incl., and 12 to 16 incl., are received in evidence.

Court reserves ruling re admissibility of Plf's Ex. 1, 9, and 10.

It Is Ordered that both sides file briefs on or before May 20, 1953, 5 p.m., and that reply briefs be filed by May 25, 1953, the cause then to stand submitted.

EDMUND L. SMITH, Clerk.
/s/ WM. A. WHITE, Deputy Clerk. [86]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: May 27, 1953. At: Los Angeles, Calif.

Present: The Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: none.

Counsel for Plaintiff: No appearance.

Counsel for Defendants: No appearance.

Proceedings:

This cause having been taken under submission after trial as to defendants Glens Falls Indemnity Co. and E. F. Grandy, Inc.

It Is Ordered that judgment be entered in favor of plaintiff as prayed; counsel for plaintiff to draw formal findings and judgment.

Clerk will notify counsel.

EDMUND L. SMITH, Clerk.
/s/ By WM. A. WHITE, Deputy Clerk. [99]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial May 8, 1953, the Honorable Ernest A. Tolin, Judge Presiding.

The plaintiff was represented by its attorneys, Wolfson & Essey and Irving H. Green, by Irving H. Green, and the defendants, Glens Falls Indemnity Company and E. F. Grandy, Inc., were represented by their attorneys, John E. McCall and George Sturr.

The case was presented upon the complaint of the plaintiff and the answer filed on behalf of defendants, Glens Falls Indemnity Company and E. F. Grandy, Inc.

The court, having heard all of the evidence, considered all of the stipulations of the parties and being fully advised in the premises, made the following:

Findings of Fact

1. That it is true as alleged in Paragraph I of the [112] Complaint that the plaintiff is a corpora-

tion duly organized under the laws of the State of New Jersey and is duly qualified to do business in the State of California.

2. That it is true as alleged in Paragraph II of the Complaint that the defendant, Glens Falls Indemnity Company, is a New York corporation duly organized under the laws of the State of New York and doing business in the State of California.

3. That it is true as alleged in Paragraph III of the Complaint that diversity of citizenship exists between all the parties plaintiff and all the parties defendant, and that the amount in controversy is in excess of $3,000.00.

4. That it is true as alleged in Paragraph IV of the Complaint that on or about the 29th day of April, 1949, the defendant, E. F. Grandy, Inc., had entered into a written contract or authorization with the United States Government dated April 29, 1949, in which said E. F. Grandy, Inc. agreed to act as General Contractor for the performance of work known and described as conversion of Building 15-16 U. S. Naval Ammunition & Net Depot, Seal Beach, California, under what was known as project NO6-16752, Spec. 20656.

5. That it is true as alleged in Paragraph V of the Complaint that on or about the 4th day of May, 1949, said E. F. Grandy, Inc., as General Contractor, entered into a written contract with one V. L. Murphy, which contract was designated as "Sub-Contract" by the terms of which said V. L. Murphy, as Sub-contractee, was to furnish all materials, labor, tools, machinery, equipment, light,

power, water or other things necessary to perform and complete the plumbing and piping portion of the work as described by Section 17, Spec. 20656 Y & D Drawings No. 417042 through 417055; that the contract price on said sub-contract was the sum of $16,667.05.

It is true as alleged in said Paragraph V that said sub-contract [113] provided that the Sub-contractee shall furnish to the Contractor a Performance or Completion Bond, which Bond was furnished by said Sub-Contractee, to wit, V. L. Murphy, in the principal sum of $16,667.05, with the defendant, Glens Falls Indemnity Company, as Surety and that said Performance Bond was executed by said corporation in writing on the 18th day of May, 1949, conditioned as follows:

"The condition of this obligation is such, that whereas the Obligee entered into a certain contract, with the Government, dated April 29, 1949, for conversion of Bldg. IS-16, U. S. Naval Ammunition & Net Depot, Seal Beach, California, NO6-16752, Specification 20656 and,

"Whereas, said Principal entered into a written subcontract on the 4th day of May, 1949, with E. F. Grandy, Inc., for Plumbing and Piping; per Section 17, Specification 20656, Y & D Drawings No. 417042 through 417055.

"Now, Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by

the Government, with or without notice to the Surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue." [114]

That is is true as alleged in said paragraph that on the 18th day of May, 1949, the said Sub-contractee V. L. Murphy, as principal and Glens Falls Indemnity Company, a New York corporation, as Surety, executed in writing a payment bond running to the defendant, E. F. Grandy, Inc., in the penal sum of $8,333.58, conditioned as follows:

"The Condition of This Obligation Is Such, that whereas the said Obligee entered into a certain contract with the Officer-in-Charge of Construction, U. S. Naval Base, Los Angeles, for the United States Government, dated April 29, 1949, for Conversion of Bldg. IS-16 U. S. Naval Ammunition & Net Depot, Seal Beach, Calif. NO6-16752, Specification 20656.

"Whereas, said Principal on the 4th day of May, 1949 entered into a written subcontract agreement with E. F. Grandy, Inc. for Plumbing and Piping; per Section 17, Specification 20656, Y & D Drawings No. 417042 through 417055

Now Therefore, If the Above Principal shall indemnify and hold the said Obligee free and harm-

less from and against all loss and damage by reason of its failure to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect."

6. That it is true as alleged in Paragraph VI of the Complaint that the defendants, E. F. Grandy, Inc., and Glens Falls Indemnity Company, knew that in order for said V. L. Murphy to carry out his contract, it would be and was necessary for him to purchase and [115] obtain supplies and materials from plaintiff.

That it is true as alleged in said paragraph that said performance bond and payment bond were written in part for the protection of plaintiff to the extent of plaintiff's claim as made in said Complaint and that there existed a contractual relationship relating to said Performance Bond and Payment Bond between plaintiff and the defendants, E. F. Grandy, Inc., and Glens Falls Indemnity Company, and each of them.

7. That it is true as alleged in Paragraph VII of the Complaint that on the 1st day of June, 1949, the plaintiff, under and pursuant to an agreement in writing with the said V. L. Murphy, which said agreement was approved by the defendant, E. F. Grandy, Inc., furnished certain goods, wares and materials commonly described as a chemical sink, and equipment which were installed on said project and that said goods, wares and equipment were of

the reasonable worth and value and of the contract price of $6,356.00.

8. That it is true as alleged in Paragraph VIII of the Complaint that said E. F. Grandy, Inc., received payment from the United States government for the materials furnished by the plaintiff.

9. That it is true as alleged in Paragraph IX of the Complaint that said V. L. Murphy has failed and refused to pay to the plaintiff the reasonable worth and value and contract price, to wit, $6,356.00, for said materials which were furnished to and used on said project, and that said E. F. Grandy, Inc. has failed and refused to pay the same, and that said defendant, Glens Falls Indemnity Company, has failed and refused to pay the same and that in truth and in fact the said plaintiff American Seating Company has not been paid the sum of $6,356.00, which sum was due and owing to the said plaintiff from the said defendants from and after the 1st day of June, 1949. [116]

10. That, except as hereinabove specifically found to be the facts, the allegations of the Answers herein are found to be untrue.

Based upon the foregoing Findings of Fact, the Court rendered the following:

Conclusions of Law

I.

Plaintiff is entitled to recover from the defendants, Glens Falls Indemnity Company, a New York Corporation, and from E. F. Grandy, Inc., a Cali-

fornia Corporation, jointly, as and for the reasonable worth and value and the contract price of goods furnished, the sum of $6,356.00, plus interest on said sum of $6,356.00 at seven per cent (7%) per annum from and after June 1, 1949, that is to say interest in the sum of $1,975.41, or a total sum of $8,331.41.

II.

Plaintiff is entitled to recover from the defendants, Glens Falls Indemnity Company, a New York Corporation, and from E. F. Grandy, Inc., a California Corporation, jointly, the plaintiff's costs in this action.

III.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Court rendered its Judgment.

Dated: This 9th day of June, 1953.

/s/ ERNEST A. TOLIN,

Judge of the United States District Court, Southern District of California, Central Division.

Affidavit of Service by Mail attached. [118]

[Endorsed]: Filed June 9, 1953.

In the District Court of the United States, Southern District of California, Central Division.

No. 14305-T

AMERICAN SEATING COMPANY, a New Jersay Corporation, Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a New York Corporation, E. F. GRANDY, INC., a California Corporation, et al.,

Defendants.

JUDGMENT

The Court having made its Findings of Fact and Conclusions of Law, and good cause appearing therefor, renders judgment as follows:

I.

It Is Ordered, Adjudged and Decreed that plaintiff shall have and recover from the defendants, Glens Falls Indemnity Company, a New York Corporation, and E. F. Grandy, Inc., a California Corporation, jointly, the sum of $6,356.00, plus interest on said sum of $6,356.00 at seven per cent (7%) per annum from and after June 1, 1949, to date of judgment, that is to say interest in the sum of $1,975.41, or a total sum of $8,331.41.

II.

It Is Further Ordered, Adjudged and Decreed that plaintiff [119] shall have and recover from the defendants, Glens Falls Indemnity Company, a New

York Corporation, and E. F. Grandy, Inc., a California Corporation, jointly, plaintiff's costs in this action.

III.

The Clerk is directed to enter judgment accordingly.

Costs taxed at $66.87.

Dated: This 9th day of June, 1953.

/s/ ERNEST A. TOLIN,
Judge of the United States District Court, Southern District of California, Central Division.

Affidavit of Service by Mail attached. [121]

[Endorsed]: Filed June 9, 1953.

[Title of District Court and Cause.]

MOTION FOR A NEW TRIAL

Now Come Glens Falls Indemnity Company and E. F. Grandy, Inc., Defendants in the above entitled cause, and move this Honorable Court for an order setting aside the judgment herein against these Defendants and granting a new trial of the above entitled cause, for the following reasons:

1. The judgment against Defendants E. F. Grandy, Inc. and Glens Falls Indemnity Company and the following findings of fact are not supported by the evidence herein, in that the following particulars are unsubstantiated:

(a) Finding 6 is not supported by any evidence

in so far as it finds that Defendants E. F. Grandy, Inc., and Glens Falls Indemnity Company knew that in order for V. L. Murphy to carry out his contract, it would be and [123] was necessary for him to purchase and obtain supplies and materials from plaintiff.

There is no evidence whatever that defendants E. F. Grandy, Inc., and Glens Falls Indemnity Company knew that Murphy would have to buy this material from plaintiff. Nor do any of the Answers to Interrogatories, herein, or Request for Admissions and their Answers herein establish this fact. Nor was the fact of this knowledge on the part of the said defendants agreed on at the pre-trial conference herein. Instead, it was specifically disputed by counsel for said defendants at said pre-trial conference (Rep. Tr. of Pre-Trial Conference, p. 12, lines 11-14). The finding of this knowledge on the part of said defendants in finding 6 is therefore completely unsupported by any evidence or admission, and it is a material question of fact, put in issue by the pleadings and at the pre-trial conference herein.

(b) Finding 6 is not supported by any evidence in so far as it finds that the performance bond, (Exhibit 3) and payment bond (Exhibit 4), were written in part for the protection of plaintiff to the extent of plaintiff's claim as made in its complaint herein.

This is a material question of fact put in issue by the pleadings herein. There is no evidence or admission or answer to interrogatories or agreed

statement of fact from the pre-trial conference herein to support this finding that these bonds were written for the protection of plaintiff. In fact, when plaintiff asked defendant E. F. Grandy, Inc., in Interrogatory number 27 of its Interrogatories of said defendant, on file herein: "What was your purpose in requiring V. L. Murphy to furnish you with a bond in the sum of $8,833.58?" the [124] said defendant answered: "For protection in the event of loss to me." (Emphasis added.)

And when plaintiff asked said defendant in plaintiff's Request for Admissions, number 4, on file herein, to admit: "That the purpose of requiring V. L. Murphy to furnish the payment bond referred to in plaintiff's complaint was obtained for the purpose of protecting the defendant, E. F. Grandy, Inc., and any suppliers and material man from any loss due to the failure of V. L. Murphy to pay such material man or suppliers," (Emphasis added) said defendant replied "Affiant's purpose in securing the payment bond was to protect E. F. Grandy, Inc. and no one else, against loss". (Emphasis added.)

These two statements of defendant E. F. Grandy, Inc. are the only two statements of any evidentiary value whatever in this case regarding this finding on the material question of fact of the purpose and intent of the said defendants in executing the said two bonds in this case. Far from supporting this finding, they completely negative said finding.

(c) Finding 6 is not supported by any evidence

is so far as it finds that "There existed a contractual relationship relating to said Performance Bond and Payment Bond between plaintiff and the defendants, E. F. Grandy, Inc. and Glens Falls Indemnity Company, and each of them." In so far as this "finding" involves a material question of fact, there is no evidence nor admission nor answer to interrogatories, nor agreed statement of fact from the pre-trial conference, whatsoever in this case to support such a finding. In any event, this statement is not properly a finding of fact; it is a conclusion of law, but a conclusion that is not based on any finding that has [125] any support whatever from the evidence in this case.

(d) Finding 7 is not supported by any evidence in so far as it finds that the said agreement in writing between plaintiff and V. L. Murphy, whereby plaintiff furnished to the said V. L. Murphy certain goods, wares and equipment, "was approved by the defendant, E. F. Grandy, Inc."

There is no evidence or admission or answer to interrogatories or agreed statement of fact from the pre-trial conference that defendant E. F. Grandy, approved said agreement.

(e) Finding 9 is not supported by any evidence in so far as it finds that $6,356.00 "was due and owing to the said plaintiff from the said defendants from and after the 1st day of June, 1949." In the first place, this is not a proper finding of fact, but is, instead, a conclusion of law, and should therefore not be a part of Finding 9. In the second place, it is not supported by any evidence, admission, an-

swer to interrogatory, or agreed statement of fact from the pre-trial conference in this case.

2. Conclusion of Law I and the judgment against defendant E. F. Grandy, Inc., are not supported by the evidence and the Court has failed to make findings sufficient to support said Conclusion of Law I and the judgment against said defendant in the following particulars:

(a) In so far as Conclusion of Law I and the judgment against said defendant E. F. Grandy, Inc., are based on the "contract price of goods furnished," the Court has failed to make any finding establishing any contract between plaintiff and the said E. F. Grandy, Inc., for the purchase and sale of the materials, on the following [126] material questions of fact which were in issue in this case:

(i) There is no finding on the material issue of fact whether plaintiff made an offer to sell and supply said materials to defendant E. F. Grandy, Inc.

(ii) There is no finding on the material issue of fact of whether defendant E. F. Grandy, Inc., accepted such an offer from plaintiff.

(iii) There is no finding on the material issue of fact of whether such an offer and acceptance between plaintiff and defendant E. F. Grandy, Inc., was based on mutually contemplated consideration passing from each of said parties to the other, or promises between the said two parties to exchange such consideration.

(b) In so far as Conclusion of Law I and the judgment against defendant E. F. Grandy, Inc.,

are based on the "reasonable worth and value * * * of goods furnished," the Court has failed to make any finding establishing any factual relationship between plaintiff and said defendant E. F. Grandy, Inc., to sustain said conclusion and judgment in the following particulars:

(i) There is no finding on the material issue of fact of whether defendant E. F. Grandy, Inc., ever requested plaintiff to furnish said goods to said defendant or anyone else.

(ii) There is no finding on the material issue of fact of whether defendant E. F. Grandy, Inc., ever promised plaintiff or anyone else that it would pay for said furnished goods.

The judgment against defendant E. F. Grandy, Inc., and Conclusion of Law I are not only not sustained by any [127] findings, as specified, but they are also not sustained by any evidence to establish facts establishing a contract between defendant E. F. Grandy, Inc., and plaintiff, or facts giving rise to a legal restitutionary right of recovery in the plaintiff against defendant E. F. Grandy, Inc., based on unjust enrichment for the reasonable worth and value of goods furnished.

3. The judgment herein is against the law, and the Court was in error in holding that defendant Glens Falls Indemnity Company is liable to plaintiff, in that:

(a) Judgment against defendant Glens Falls Indemnity Company cannot be predicated on the payment bond (Exhibit 4) herein because:

(i) This bond is conditioned solely to indemnify

and hold harmless defendant E. F. Grandy, Inc., and as a matter of law, a bond so conditioned does not give anyone a right of action thereon except the named obligee (in this case, defendant E. F. Grandy, Inc.) Plaintiff does not therefore have a right of action or a right to recover from defendant Glens Falls Indemnity Company on this bond at all. (See Points and Authorities attached hereto, citing the case of Thode vs. McAmis.)

(ii) This bond is a bond of indemnity against actual loss or damage to defendant E. F. Grandy, Inc., and even E. F. Grandy, Inc. could not recover on this bond because it has not suffered any loss or damage which it must do, as a matter of law, before it can recover on this bond, and certainly the plaintiff cannot recover on it. (See Points and Authorities attached hereto, citing Cal. Civil Code Section 2778.) [128]

(b) Judgment against defendant Glens Falls Indemnity Company cannot be predicated on the performance bond (Exhibit 3) because:

(i) The execution of a separate payment bond (Exhibit 4) precludes, as a matter of law, any recovery from Glens Falls Indemnity Company for payment of materialmen on the performance bond (Exhibit 3). (See Points and Authorities attached hereto citing Maryland Casualty Co. vs. Shafer and other California cases.)

(ii) The execution and existence of a separate statutory payment bond, pursuant to the prime contract, (Exhibit A) by the prime contractor, E. F. Grandy, Inc., and its surety under the Miller Act

(40 U. S. C. A. 270 b) precludes, as a matter of law, any recovery from Glens Falls Indemnity Company for payment of materialmen on the performance bond (Exhibit 3). (See Maryland Casualty Company vs. Shafer and other cases cited in Points and Authorities attached hereto.)

(iii) Plaintiff as a matter of law, does not have any right of action on the performance bond. No one has a right of action against Glens Falls Indemnity Company on the performance bond, except the named obligee, defendant E. F. Grandy, Inc. (See Maryland Casualty Company vs. Shafer and other California cases cited in Points and Authorities attached hereto.) [129]

4. The judgment herein is against the law and the Court was in error in holding that the following allegations in the Answers of defendants Glens Falls Indemnity Company and E. F. Grandy, Inc., are untrue (Finding 10), and Finding 10 is not based on any evidence in the following particulars:

(a.) Paragraph II of the Answer of defendant Glens Falls Indemnity Company, and Paragraph II of the Answer of defendant E. F. Grandy, Inc. specifically denied the allegations contained in Paragraph VI of plaintiff's complaint, which said Paragraph VI alleged that said defendants knew that V. L. Murphy had to obtain materials from plaintiff.

Plaintiff's said allegation in Paragraph VI of its complaint is not supported by any evidence whatsoever nor by any agreed statement of fact from the pre-trial conference, nor by any answer

to interrogatories or admission on file herein, as pointed out in Point 1-a of this Motion For New Trial. Since the burden of proof on this issue was the plaintiff's, it must therefore be held that said defendant's denials of the said allegation in Paragraph VI of plaintiff's complaint are true and that the Court erred in holding them untrue in Finding 10, and that since this allegation of such knowledge on the part of said defendants is a material issue of fact in this case, the judgment herein is against the law.

(b). Paragraph II of the respective Answers of said defendants specifically denied the allegations contained in Paragraph VI of plaintiff's complaint, which said Paragraph VI alleged that the performance bond, (Exhibit 3) and the payment bond (Exhibit 4) were written in part for the protection of plaintiff to the extent of [130] plaintiff's claim as made in its complaint herein.

Plaintiff's said allegation in Paragraph VI of its complaint, is not supported by any evidence whatsoever. In fact it is shown to be untrue by defendant Grandy's answer to Interrogatory number 27, and by defendant Grandy's response to plaintiff's Request For Admission number 4, as more specifically set out in Point 1-b of this Motion for New Trial.

Since the burden of proof on this issue of the purpose for which the bonds were written was on the plaintiff, and since plaintiff offered no proof thereon, and since the only statements in this case regarding this point are the Answers of defendant

E. F. Grandy to the aforesaid Interrogatory 27 and Request for Admission number 4, which support defendant's said denials in Paragraph II of their respective Answers, it must therefore be held that said defendants' denials of the said allegation in Paragraph VI of plaintiff's complaint, are true, and that the Court erred in holding them untrue in Finding 10, and that since this question was of material issue of fact in this case, the judgment herein is therefore against the law.

(c.) Paragraph III of the Answer of defendant Glens Falls Indemnity Company denies on lack of knowledge or information sufficient to form a belief, and Paragraph III of the Answer of defendant, E. F. Grandy, Inc. specifically denies the allegation in Paragraph VII of plaintiff's complaint that the agreement between plaintiff and V. L. Murphy, whereby plaintiff would furnish V. L. Murphy with the materials sued for in plaintiff's complaint, was approved by defendant E. F. Grandy, Inc.

As more fully set out in Point 1-c of this [131] Motion for New Trial, plaintiff's said allegation in Paragraph VII of its complaint is not supported by any evidence whatsoever. Since the burden of proof on this question of approval by defendant E. F. Grandy, Inc., was on the plaintiff, and since plaintiff failed to prove it, and since it was never admitted by said defendants, it must be held, therefore, that said defendants' denials of the said allegation in Paragraph VII of plaintiff's complaint are true, and that the Court erred in holding them

untrue in Finding 10, and that, since this question was a material issue of fact in this case, the judgment herein is therefore against the law.

(d.) Paragraph III of the Answer of defendant Glens Falls Indemnity Company denies on lack of knowledge or information sufficient to form a belief, and Paragraph V of the Answer of defendant E. F. Grandy, Inc., denies specifically the allegation of Paragraph X of plaintiff's complaint that said defendants knew that V. L. Murphy had to obtain materials from plaintiff.

This point is fully covered in Point 4-a of this Motion for New Trial and the same errors specified there apply with equal force here. Therefore, it must be held that said defendants' denials of the said allegation in Paragraph X of plaintiff's complaint are true and that the Court erred in holding them untrue in Finding 10, and that since this allegation of such knowledge on the part of said defendants is a material issue of fact in this case, the judgment herein is against the law.

5. There is no finding establishing the corporate existence [132] and capacity of defendant E. F. Grandy, Inc., and therefore jurisdiction of the Court in this case is not shown by the findings of fact and Finding 3 is unsupported by a direct finding in this regard.

6. At the time of the trial, on May 8th, 1953, defendants Glens Falls Indemnity Company and E. F. Grandy, Inc., specifically objected to the intro-

duction into evidence of plaintiff's exhibits for identification numbers 1, 9 and 10. The Court reserved a ruling on these objections. Said defendants pointed out this fact in their Trial Brief, filed subsequently. The Court however, never ruled on these objections.

7. The Findings of Fact and Conclusions of Law state that this case "was presented upon the complaint of the plaintiff, and the Answer filed on behalf of defendants Glens Falls Indemnity Company and E. F. Grandy, Inc." This statement is incomplete and should be corrected. It should state that this case was presented upon the complaint of the plaintiff and the respective answers filed on behalf of defendants Glens Falls Indemnity Company and E. F. Grandy, Inc., and upon plaintiff's two respective Interrogatories and the respective responses thereto by defendants Glens Falls Indemnity Company and E. F. Grandy, Inc., and upon plaintiff's Request for Admissions of defendant E. F. Grandy, Inc., and responses thereto by said defendant and upon the facts as agreed upon by counsel at the pre-trial conference held herein on April 1st, 1953.

Wherefore, Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc., move that they may be granted a new trial in said cause upon a date certain to be fixed by the Court and that the findings of fact and conclusions of law herein be amended in accordance with the specifications con-

tained herein, pursuant to Rules 52 and 59 of the Federal Rules of Civil Procedure. [133]

Dated: June 19th, 1953.

Respectfully submitted,

/s/ JOHN E. McCALL,

Attorney for Defendants, Glens Falls Indemnity Company and E. F. Grandy, Inc. [134]

Affidavit of Service by Mail attached. [137]

[Endorsed]: Filed June 19, 1953.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR NEW TRIAL

To American Seating Company, a Corporation, and to its attorneys, Wolfson & Essey and Irving H. Green; and to the Farmers & Merchants Bank of Long Beach, a Corporation, and to its attorney, M. W. Horn:

You and Each of You Will Please Take Notice that on Monday, the 6th day of July, 1953, at 10:00 a.m., or as soon thereafter as counsel may be heard, in the above-entitled Court, located on the 2nd Floor of the Federal Building, Los Angeles, California, Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc., will move the Court for an order setting aside the judgment herein and granting a new trial to the Glens Falls Indemnity Company and [138] E. F. Grandy, Inc., and for such other order or orders as may be meet and just.

Dated: June 19th, 1953.

/s/ JOHN E. McCALL,
Attorney for Defendants, Glens Falls Indemnity Company and E. F. Grandy, Inc. [139]

Affidavit of Service by Mail attached. [140]
[Endorsed]: Filed June 19, 1953.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: June 25, 1953. At Los Angeles, Calif.

Present: The Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: None.

Counsel for Plaintiff: No appearance.

Counsel for Defendants: No appearance.

Proceedings: On the Court's own motion It Is Ordered that defendants' motion for new trial is continued from July 6, 1953, to October 5, 1953, at 10 a.m.

It Is Further Ordered that if counsel desire attention to the motion earlier than October 5, 1953, they may fine memo. of points and authorities and a stipulation for submission of the motion on those points and authorities, or they may file briefs, provided they do not wish to have the motion argued orally.

Clerk will notify counsel.

EDMUND L. SMITH, Clerk
/s/ By WM. A. WHITE, Deputy Clerk [141]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Sept. 30, 1953. At Los Angeles, Calif.

Present: The Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: None.

Counsel for Plaintiff: No appearance.

Counsel for Defendants: No appearance.

Proceedings: On the Court's own motion It Is Ordered that hearing on motion of defendants Glens Falls Indemnity Co. and E. F. Grandy Inc. is continued from October 5, 1953, to October 19, 1953, 11 a.m.

Clerk to notify counsel.

EDMUND L. SMITH,
Clerk
/s/ By WM. A. WHITE,
Deputy Clerk [142]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: October 19, 1953. At Los Angeles, Calif.

Present: The Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: Marie Zellner.

Counsel for Plaintiff: Irving H. Green.

Counsel for Defendant: Albert Lee Stephens, Jr.

Proceedings: For hearing on defendant's Glens Falls Indemnity Company and E. F. Grandy, Inc., motion for new trial.

Attorney for defendants argues motion for new trial.

Plaintiff replies to defendant's argument.

It Is Ordered either party may file further memorandas, if they so desire and will notify the clerk by letter on or before 10/21/53 of their intentions to do so, said memoranda to be filed by 5 p.m., October 26, 1953 when said motion will stand submitted.

EDMUND L. SMITH,
Clerk
/s/ By WM. A. WHITE,
Deputy Clerk [161]

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 31, 1953. At Los Angeles, Calif.

Present: The Hon. Ernest A. Tolin, District Judge; Deputy Clerk: Wm. A. White; Reporter: None.

Counsel for Plaintiff: No appearance.

Counsel for Defendants: No appearance.

Proceedings: It Is Ordered that motion of defendants Glens Falls Indemnity Co. and E. F.

Grandy, Inc., for new trial, heretofore taken under submission, be, and hereby is denied.

Clerk will notify counsel.

EDMUND L. SMITH,
Clerk
/s/ By WM. A. WHITE,
Deputy Clerk [170]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Glens Falls Indemnity Company, a New York corporation, and E. F. Grandy, Inc., a California corporation, defendants above named, hereby appeal to the United States Court of Appeals for the Ninth Circuit, from the final judgment entered in this action on June 9, 1953, a motion for new trial by said defendants having been denied by order entered December 30, 1953.

Dated: January 26, 1954.

/s/ JOHN E. McCALL,
Attorney for Appellants Glens Falls Indemnity Company and E. F. Grandy, Inc. [177]

[Endorsed]: Filed January 26, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That E. F. Grandy, Inc., a California corporation, as Principal, and Great American Indemnity Company, a New York corporation, authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto American Seating Company, a New Jersey corporation, in the full and just sum of Ten Thousand Dollars ($10,000) to be paid to the said American Seating Company, its certain attorney, successors and assigns; to which payment well and truly to be made, we bind ourselves, jointly and severally, by these presents. [178]

Whereas, on June 9, 1953, in an action pending in the United States District Court for the Southern District of California, Central Division, between American Seating Company, as plaintiff, and Glens Falls Indemnity Company and E. F. Grandy, Inc., as defendants, a money judgment was rendered against said defendants and the said defendants having filed a Notice of Appeal from the said judgment to the United States Court of Appeals for the Ninth Circuit;

Now Therefore, the condition of this obligation is such that if E. F. Grandy, Inc. shall prosecute its appeal to effect and shall satisfy the judgment in full together with costs, interest and damages for delay if for any reason the appeal is dismissed or

if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then this obligation to be void; otherwise, to remain in full force and effect.

The above-named Surety, Great American Indemnity Company, hereby consents and agrees that in case of default or contumacy on the part of the Principal or said Surety, the Court may, upon notice to said Surety of not less than ten (10) days, proceed summarily and render judgment against it in accordance with its obligation and award execution thereon.

In Witness Whereof, the Principal has hereunto set its hand and seal by duly authorized officer thereof and Surety has caused this bond to be executed by its duly [179] authorized attorney in fact and caused its corporate seal to be hereunto affixed this 22nd day of January, 1954.

E. F. GRANDY, INC.,
/s/ By E. F. GRANDY, Pres.
Principal

[Seal] GREAT AMERICAN INDEMNITY COMPANY,

/s/ By HAROLD W. McGEE,
Attorney in Fact—Surety

Executed in duplicate.

The Premium on this bond is $200.00 per annum.

Examined and recommended for approval as provided in United States District Court for the

Southern District of California, Central Division, Local Rule No. 8.

/s/ JOHN E. McCALL,
Attorney for Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.

Duly Verified.

I hereby approve the foregoing.

Dated this 26th day of January, 1954.

/s/ ERNEST A. TOLIN, Judge [180]

[Endorsed]: Filed January 26, 1954.

[Title of District Court and Cause.]

SUPERSEDEAS BOND

Know All Men By These Presents:

That Glens Falls Indemnity Company, a New York corporation, and Great American Indemnity Company, a New York corporation, authorized to transact a surety business in the State of California, as Surety, are held and firmly bound unto American Seating Company, a New Jersey corporation, in the full and just sum of Ten Thousand Dollars ($10,000) to be paid to the said American Seating Company, its certain attorney, successors and assigns; to which payment well and truly to be made, we bind ourselves, jointly and severally, by these presents. [181]

Whereas, on June 9, 1953, in an action pending

in the United States District Court for the Southern District of California, Central Division, between American Seating Company, as plaintiff, and Glens Falls Indemnity Company and E. F. Grandy, Inc., as defendants, a money judgment was rendered against said defendants and the said defendants having filed a Notice of Appeal from the said judgment to the United States Court of Appeals for the Ninth Circuit;

Now Therefore, the condition of this obligation is such that if Glens Falls Indemnity Company shall prosecute its appeal to effect and shall satisfy the judgment in full together with costs, interest and damages for delay if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the judgment and such costs, interest and damages as the Appellate Court may adjudge and award, then this obligation to be void; otherwise, to remain in full force and effect.

The above-named Surety, Great American Indemnity Company, hereby consents and agrees that in case of default or contumacy on the part of the Principal or said Surety, the Court may, upon notice to said Surety of not less than ten (10) days, proceed summarily and render judgment against it in accordance with its obligation and award execution thereon.

In Witness Whereof, the Principal has hereunto set its hand and seal by duly authorized officer thereof and Surety has caused this bond to be ex-

ecuted by its duly [182] authorized attorney in fact and caused its corporate seal to be hereunto affixed this 22nd day of January, 1954.

GLENS FALLS INDEMNITY COMPANY,

/s/ By JOHN E. McCALL, Attorney, Principal

[Seal] GREAT AMERICAN INDEMNITY COMPANY,

/s/ By HAROLD W. McGEE, Attorney in Fact—Surety

Executed in duplicate.

The Premium on this bond is $200.00 per annum.

Examined and recommended for approval as provided in United States District Court for the Southern District of California, Central Division, Local Rule No. 8.

/s/ JOHN E. McCALL,

Attorney for Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc.

Duly Verified.

I hereby approve the foregoing.

Dated this 26th day of January, 1954.

/s/ ERNEST A. TOLIN, Judge [183]

[Endorsed]: Filed January 26, 1954.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 194, inclusive, contain the original Complaint; Summons; Stipulation; Answer to Complaint; Plaintiff's Interrogatories to Defendant Glens Falls Indemnity Company; Answer to Interrogatories; Notice of Trial Setting; First Alias Summons; Answer of Defendant E. F. Grandy, Inc.; Request for Admissions; Plaintiff's Interrogatories to Defendant E. F. Grandy, Inc.; Substitution of Attorneys; Answer to Interrogatories; Answer to Request for Admissions; Plaintiff's Memorandum Brief; Memorandum Brief of Defendant Farmers and Merchants Bank of Long Beach; Pre-Trial Brief of Glens Falls Indemnity Company et al; Reply Brief of Plaintiff; Memorandum re Time of Trial; Pre-Trial Brief of Glens Falls Indemnity Company et al; Plaintiff's Reply to Defendants' Brief; Findings of Fact and Conclusions of Law; Judgment; Cost Bill; Motion for New Trial; Notice of Motion for New Trial; Defendants' Supplemental Memorandum on Motion for New Trial; Points and Authorities of Plaintiff; Reply to Points and Authorities of Plaintiff; Ex Parte Motion for Ten-Day Stay of Execution; Ex Parte Motion and Order for Stay of Execution; Notice of Appeal; Two Supersedeas Bonds; Designation of Record on Appeal; Designation of Additional

Portions of Record on Appeal; and Appellee's Objection to Designation of Non-Essential Matter by Appellants and a full, true and correct copy of Minutes of the Court for October 6, 1952, January 5, February 3, April 1, May 8 and 27, June 25, September 30, October 19 and December 13, 1953 which, together with original Plaintiff's Exhibits 1 to 17, inclusive, and Defendants' Exhibits A, B, and C, and Reporter's Transcript of Proceedings on April 1 and May 8, 1953, in two volumes, transmitted herewith, constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to $6.40 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 2nd day of March, A.D. 1954.

[Seal] EDMUND L. SMITH,
Clerk.
/s/ By THEODORE HOCKE,
Chief Deputy.

In the United States District Court, Southern District of California, Central Division

No. 14,305-T Civ.

AMERICAN SEATING COMPANY,

Plaintiff.

vs.

GLENS FALLS INDEMNITY COMPANY, E. F. GRANDY, INC., FARMERS AND MERCHANTS BANK OF LONG BEACH,

Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Los Angeles, California.

Wednesday, April 1, 1953.

Honorable Ernest A. Tolin, Judge Presiding.

Appearances: For Plaintiff: Irving H. Green, Esq. For Defendants: John E. McCall, Esq., and George Sturr, Esq., for defendants Glens Falls and E. F. Grandy. M. W. Horn, Esq., for defendant Farmers & Merchants Bank of Long Beach. [1*]

The Court: Mr. Reporter, we commenced an informal pretrial in the absence of the official reporter, in our customary way, having the intention to dictate a summary of it.

However, it appears that there is possibly more in this case than the Court can adequately sum-

---

* Page numbering appearing at top of original Reporter's Transcript of Record.

marize without some record being made as we go along, and some dispute has arisen.

It was understood at the outset that the facts of the case would be conceded. Mr. Green has undertaken to state the facts of the case, and Mr. McCall has taken issue with a part of that statement.

We therefore decided to place the remainder of the pretrial on record, and when I say "remainder," we will *state* fresh with a statement of facts.

The dispute has arisen over a letter, of which a photostat has been marked Plaintiff's Exhibit 1 for identification in our record.

We will allow that to stand, noting that it is for identification, and it is not received in evidence.

Mr. McCall has said that Mr. Green's statement of facts in this pretrial statement is accurate, provided it be shorn of the conclusions. When we get to determining what [2] is a conclusion and what is an allegation of fact, we often have difficulty.

So, Mr. McCall, will you state again, or Mr. Green, and if any other counsel disagrees with any part of the statement, just put in your comment; but if we can now get what are admitted facts, that will be very helpful.

Mr. McCall: I notice that this letter, which I believe your Honor stated would be marked for identification, does not appear to have been signed.

Mr. Green: This is a photostat copy of the copy that was in the Grandy file when it was turned over to us, and that original copy was returned to Grandy, and if Mr. McCall has the file, he will find that in the file. This is not the original letter.

This is not a photostat of the original letter that was received by Mr. Murphy.

The Court: You are contending this is the writer's file copy of the letter which he sent?

Mr. Green: Yes.

The Court: Are you contending the letter was signed by someone when it was sent?

Mr. Green: The file copy wouldn't be signed, naturally, but the original was signed.

The Court: Who signed the original?

Mr. McCall: I never heard of it before, and it doesn't appear to be signed by anyone. [3]

The Court: The file copy ordinarily isn't.

Mr. McCall: I don't have his file, but he has been telling me for a long time that he didn't have all the file back from the attorneys when they sued Mr. Murphy.

Mr. Green: We will take Mr. Grandy's deposition, and at all times Mr. McCall has said they would agree to the facts, but he won't do it.

Mr. McCall: I want to nab that right away. There was never impression given there was any liability. If he wants to take Grandy's deposition, I suggest we let him take Grandy's deposition, and then let us have the pretrial.

The Court: Let us conclude this as a pretrial hearing, and then we can resume it after the taking of the deposition, if it is indicated.

I would not like to lose the benefit of having all of you gentlemen here today. We might develop further the controversy which will shape the depo-

sition into one particular area which you feel you are in agreement on.

Mr. Green: Mr. McCall made the statement before this court in this hearing that he stipulated that in the plaintiff's memorandum brief on this pretrial, filed with this court, that the statement of essential facts as set out in that memorandum brief is true and correct. [4]

Is that true or is that not true, Mr. McCall?

Mr. McCall: I don't think that is repeating just what I said. My recollection right now is that——

Mr. Green: Regardless of what you said, what do you say now, Mr. McCall?

Mr. McCall: I haven't seen the statement for some time, but I believe it contains a true statements of facts when it is divested of all of the conclusions in it.

The Court: The difficulty is to tell what are conclusions, and when you say "essential facts," you might not consider as essential some fact which Mr. Green does.

Mr. McCall: I would be glad to take his statement of facts, and we will read it to the Court right now.

The Court: Mr. Green can read it now, but let us take what the essential facts of the case are.

We want the facts and not the conclusions, so that I can, in doing my book work and study of this case, treat of those matters as admitted facts.

So, if you cannot admit them, say so. If you can admit them, say so. We want the ultimate facts,

or you can detail it down to the evidentiary facts, if you feel so advised.

I think it is better if you give me a synopsis of the evidentiary facts.

Mr. McCall: If we think he is making conclusions [5] and self-serving statements, shall we object right there?

The Court: Object, but don't get into a quarrel about it. You say what you think.

Mr. Green: Sometime in April, 1949, the defendant E. F. Grandy, Inc., a corporation, entered into a written contract with the United States Government.

Grandy, as general contractor, made this contract for the performance of certain work at the United States Naval Ammunition and Net Depot at Seal Beach, California.

On the 4th day of May, 1949, Grandy, as general contractor, entered into a written subcontract with one V. L. Murphy, a plumbing contractor.

Do you have that original contract so that we can have it marked and put in evidence, and there won't be any dispute about it?

Mr. Sturr: You mean the subcontract?

Mr. Green: Yes, the subcontract.

Mr. McCall: Here it is.

Mr. Green: May we offer that to be marked in evidence?

Mr. McCall: It can be made a defendant's exhibit.

Mr. Green: We can make it a plaintiff's exhibit.

The Court: We can make it a plaintiff's exhibit for identification. [6]

Mr. McCall: I can have mine back then.

The Court: Yes. It will be marked Plaintiff's Exhibit 2 for identification.

(The document was thereupon marked Plaintiff's Exhibit 2 for identification.)

Mr. Green: Do you agree, counsel, that that is the contract?

Mr. McCall: Yes, that is the subcontract.

Mr. Green: All right, the subcontract.

Mr. McCall: Between Grandy and Murphy.

Mr. Green: This contract, to summarize it for the facts, provided that Murphy was to furnish all materials, labor, tools, and so forth——

Mr. McCall: That is just what I——

Mr. Green: Let me finish, please.

Mr. McCall: When the Court said when something came out that way, we were to object, and so I am objecting. The contract speaks for itself, and counsel is trying to say what the contract provides.

Mr. Green: That is for the benefit of the Court.

The Court: We will consider it said parenthetically.

Mr. Green: Parenthetically, then, we will say the contract provides that Murphy was to furnish all materials, labor, tools, and so forth, and to perform and complete the plumbing and pipe portion of the work. [7]

The contract price on the subcontract was the sum of $16,667.05.

For the record, Murphy and Grandy agreed, and

when I speak of Grandy I am talking about the corporation, that Murphy would furnish a performance bond in the sum of $16,667.05, and a payment bond in the principal sum of one-half, or $8833.58.

The Court: By payment bond do you mean a bond which will insure the payment of all material men?

Mr. Green: The bond speaks for itself too, your Honor, and if you will give me your photostat copies—well, I have them.

Pursuant to that agreement between Grandy and Murphy, Murphy furnished to Grandy a performance bond issued by the Glens Falls Indemnity Company of New York on the 18th day of May, 1949, and we offer that to be marked as Plaintiff's Exhibit 3 for identification.

Mr. McCall: No objection.

The Court: It may be marked Plaintiff's Exhibit 3 for identification.

(The document was thereupon marked Plaintiff's Exhibit 3 for identification.)

Mr. Green: For the record, Mr. McCall, you agree and admit that is a photostat copy of the performance bond written by your company? [8]

Mr. McCall: That is right.

Mr. Green: All right. On the same date he also furnished a payment bond, dated May 18, 1949. We would like to have that marked for identification as Plaintiff's Exhibit No. 4.

Mr. McCall: What is No. 1?

The Court: The letter is Plaintiff's Exhibit 1

for identification. The sequence is not quite right, you understand.

Mr. Green: I understand that.

Mr. McCall: Yes.

The Court: The letter is Plaintiff's Exhibit No. 1.

The contract is Plaintiff's Exhibit No. 2.

The performance bond is Plaintiff's Exhibit No. 3.

And the payment bond is Plaintiff's Exhibit No. 4.

(The document was thereupon marked Plaintiff's Exhibit 4 for identification.)

The Court: All these exhibits are marked for identification only.

Up to date is there any question as to the genuineness of any of these instruments, and may the Court consider the photostats in lieu of the originals?

Mr. McCall: Except as to the letter, so far as we are concerned.

The Court: As to the other three, is it stipulated [9] these photostats are true copies and that they were duly issued on or about the date they bear?

Mr. McCall: Yes. Could I compare those with mine?

Mr. Green: For your information, Mr. McCall, you furnished us those photostat copies. So, if they are in error, the error is yours, not ours.

Mr. McCall: You mean the photostat copy?

The Court: In the absence of something being pointed out, we will assume they photostated the right things.

Mr. Green: Parenthetically, again, the perform-

ance bond provides that Murphy shall carry out all the conditions and agreements of his subcontract; otherwise the penalty of the bond applies.

The payment bond provides——

Mr. McCall: That is not in evidence yet.

The Court: None of these are in evidence. They are marked for identification.

Of course, the several stipulations entered into between counsel will be the proper foundation for someone moving their admission in evidence at the proper time.

Mr. McCall: This is Plaintiff's Exhibit No. 4 for identification?

The Court: Yes.

Mr. Green: The payment bond provides, and I am now [10] quoting so I don't have to make this parenthetically:

"Now, therefore, if the above principal shall indemnify and hold the said Obligee free and harmless from and against all loss and damage by reason of its failure to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect."

I believe that answers the court's question as to the provisions of the payment bond.

The Court: When I was in law school a long time ago, that is what they called the bond against liens.

Mr. Sturr: That is going to be one of our questions as to the legal interpretation.

Mr. Green: Are you challenging whether this is a payment bond or not?

Mr. Sturr: It is a payment bond by its term and title.

Mr. Green: Payment of what?

Mr. McCall: The bond speaks for itself.

The Court: Let's get on with the facts.

Mr. Green: As part of said subcontract, it was necessary for V. L. Murphy to obtain from the [11] plaintiff certain material and equipment, which are described as a chemical sink, a chemical table, and a chemical fume hood. These were furnished by American Seating Company at the agreed price of $6124.37, were installed in connection with the subcontract for plumbing into the project, for which E. F. Grandy, Inc., had the principal contract.

The entire contract was accepted by the Government and E. F. Grandy was paid in full by the Government on this contract.

E. F. Grandy knew that it was necessary to obtain this material from——

Mr. McCall: There, of course, we object again as to what E. F. Grandy knew. That obviously is a conclusion.

Mr. Green: We are going to have exhibits marked to show it, your Honor.

The Court: All right.

Mr. Green: So we don't have to rely on counsel's argument.

Mr. McCall: May I ask counsel if he has returned to E. F. Grandy or to Grandy, Inc., all the originals of these which he has photostat copies of?

Mr. Green: Are they returned? You have the Grandy file.

Mr. McCall: That doesn't answer the question.

Mr. Green: They were all returned to him.

Mr. McCall: So he is supposed to have all the originals of all the photostats you have now?

Mr. Green: You mean you came here without first seeing your client's files as to what the facts are?

Mr. McCall: You haven't even returned his checks to him, so how can I see them?

Mr. Green: I am not talking about the checks. You know what I am talking about.

In view of Mr. McCall's position, I would like to join with him in the situation of having this pretrial continued, and we will take Mr. Grandy's deposition and we will have the facts that we can establish by his examination and not have counsel harping and challenging written documents and facts.

Mr. McCall: I don't think my objection was offensive. I certainly didn't intend it to be. The court is the best judge of that.

The Court: No one has offended the court here, and I am learning somewhat what the issues are, and learning what might be issues and what might be dissipated by continuing exactly as we are here today.

Bear in mind, we are not trying the case today, and no one need make any speeches asserting the validity of a position he takes either for or against

the plaintiff, [13] but we want to find out what these facts are and which facts are disputed.

So let's go forward, and you can take the deposition and do probably a much better job in the light of your experience gained here today.

But let us have that experience first so you will have the benefit of it, if there is any.

Mr. Green: Under date of August 22, 1949, a quotation was issued by the American Seating Company to all contractors in re this particular job, setting out the quotation for these particular items that were eventually incorporated into the project, and this was received, a copy of this was received by E. F. Grandy, Inc., on September 24, 1949; and I would like to offer that.

Mr. McCall: It is not necessary to object?

The Court: It is not necessary to object. We are just getting these documents marked for identification.

Mr. Green: The only reason I am having these marked for identification at this time is to have counsel either admit their validity or dispute their validity.

The Court: After you get them all marked, I will go through them seriatim and get an admission or rejection.

Mr. McCall: Can I see that, please?

Mr. Green: I will have it marked, and then I will be [14] glad to show it to you.

The Court: It will be marked Plaintiff's Exhibit 5 for identification.

(The document was thereupon marked Plaintiff's Exhibit 5 for identification.)

Mr. Green: That, your Honor, is the quotation, marked Plaintiff's Exhibit 5 for identification, and has on it the receipt stamp of the E. F. Grandy Company, and that is a photostat copy, and we want counsel to either admit or deny its validity.

Mr. McCall: It bears date August 22, 1949. Would counsel state the purpose of this? I don't see that it has any bearing here at all.

The Court: We will get to that phase of this proceeding a little later. At present, is the genuineness of this document admitted, the fact that it was dispatched as would prima facie appear on its face? Whether it is relevant or not, I don't know.

Mr. McCall: There is nothing admitted about it. It is something that isn't even addressed to Grandy, Inc. It is signed "American Seating Company, by T. E. Dewey."

Mr. Green: Do you admit that it bears the receipt stamp of E. F. Grandy, Inc., September 24, 1949?

Mr. McCall: It bears the stamp, but I don't know if it is the receipt stamp of the Grandy Company. [15]

Mr. Green: We are not getting any place. If counsel won't admit black is black and white is white, we might as well try the case in court and produce our witnesses.

The Court: We are getting these into the record now, marking them for identification. I will require,

however, prior to trial, that these be either admitted or denied.

For the present, they need not be, but if we can eliminate the question of validity as to any one, we should do it. If he is not in a position to do it, we won't force him. He is entitled to consult his client.

Mr. Green: Those things are in for identification and they are in the file that was furnished.

Mr. McCall: That is self-serving and untrue. We did not come into court this morning with anything that we haven't already furnished to plaintiff's counsel so he will know just what we are here with.

The Court: I am not going to try either the efficiency or the inefficiency of any counsel, and I think it will be better for your respective healths if you will avoid taking umbrage with one another.

Mr. McCall: I have low blood pressure anyway, and I am not saying anything to be offensive.

If it would suit the court better, he could bring in whatever he pleases, with the understanding that all objections are reserved for later. [16]

Mr. Green: I won't put in figures in a pretrial so you could have a chance to figure out ways to defeat them.

The Court: That is his privilege.

This is marked Plaintiff's Exhibit 5 for identification.

I know we are just trying to get facts now, but what is your contention that this letter does show, parenthetically for the moment?

Mr. Green: On August 23, 1949, the American Seating Company wrote a letter to V. L. Murphy Plumbing Company concerning this matter, and a copy was sent to E. F. Grandy, Inc., and was received by E. F. Grandy, Inc. on August 25, 1949.

May we have that marked as Plaintiff's Exhibit No. 6?

I ask counsel to either admit or deny they received that.

Mr. McCall: This appears to be a letter addressed to Mr. Murphy, signed by Mr. John D. Mullen, a copy of which was sent to Grandy and stamped "Received August 25, 1949, E. F. Grandy, Inc."

I assume it is genuine.

The Court: Are you willing to admit it is genuine, namely that, it was transmitted as it purports to be, and received by the addressee, or do you want to reserve [17] that?

Mr. McCall: I would like to reserve that and talk to Grandy.

The Court: We will consider that one reserved.

(The document was thereupon marked Plaintiff's Exhibit 6 for identification.)

Mr. Green: Will you mark this for identification?

The Court: That will be Plaintiff's Exhibit 7 for identification.

(The document was thereupon marked Plaintiff's Exhibit 7 for identification.)

Mr. Green: Under date of September 23, 1949, a purchase order was sent to American Seating Com-

pany by V. L. Murphy. A copy of it was sent to E. F. Grandy and received by them on September 24, 1949, a photostat of that, with the stamp of the Grandy Company, which has been marked for identification as Plaintiff's Exhibit No. 7.

Under date of September 26, 1949, E. F. Grandy forwarded to the officer in charge of construction, U.S. Naval Base, Los Angeles, at Long Beach, California, concerning this contract, the following letter:

Enclosed herewith four (4) copies Purchase Order from V. L. Murphy, plumbing subcontractor, to American Seating Company, agents for Kewaunee Manufacturing Company for chemical laboratory [18] equipment presenting being manufactured at Adrian, Michigan.

"It is requested that the Officer-in-Charge of Construction do everything possible to expedite factory inspection in order that, immediately upon completion, this equipment may be forwarded for installation."

That was sent by E. F. Grandy, Inc., a photostat copy of the file copy, which I have here and ask be marked Plaintiff's Exhibit No. 8.

The Court: It may be marked Plaintiff's Exhibit No. 8 for identification.

(The document was thereupon marked Plaintiff's Exhibit 8 for identificaton.)

Mr. Green: Under date of December 20, 1949, the American Seating Company wrote a letter to E. F. Grandy, Inc.——

Mr. McCall: What is the date, please?

Mr. Green: December 20, 1949—concerning this contract, and I offer that to be marked as Plaintiff's Exhibit No. 9.

The Court: It may be marked Plaintiff's Exhibit No. 9 for identification.

(The document was thereupon marked Plaintiff's Exhibit 9 for identification.) [19]

Mr. Green: That is a photostat copy of the original letter that was in the E. F. Grandy Company file.

Under date of December 22, 1949, E. F. Grandy wrote to the Officer-in-Charge of Construction relative to these, and enclosed three copies of correspondence received from American Seating Company relative to this matter, and the photostat copy of the file copy of that letter I ask be marked Plaintiff's Exhibit No. 10.

The Court: It may be marked Plaintiff's Exhibit No. 10 for identification.

(The document was thereupon marked Plaintiff's Exhibit 10 for identification.)

Mr. Green: Under date of January 6, 1950, E. F. Grandy wrote a letter to the American Seating Company. This is a photostat copy of the file copy, and I offer that as Plaintiff's Exhibit 11 for identification.

The Court: It may be marked Plaintiff's Exhibit No. 11 for identification.

(The document was thereupon marked Plaintiff's Exhibit No. 11 for identification.)

Mr. Green: It is a letter to American Seating Company concerning this particular subcontract.

These documents all have been marked Plaintiff's exhibits for identification, I assume, as part of this pretrial record, concerning which counsel will admit or [20] deny the genuineness.

Mr. McCall: They have never been submitted to counsel.

The Court: They are all exhibits marked for identification in this proceeding, and counsel may, of course, examine them.

Mr. Green: Going on with the facts, American Seating Company did furnish this material, it was installed, and was approved by the Government and accepted by the Government, and E. F. Grandy Company was paid in full by the Government for the job. They did not pay American Seating Company and V. L. Murphy did not pay American Seating Company, and to this day American Seating Company hasn't been paid.

The Court: Then the bank gets in? This is a parenthetical statement.

Mr. Green: If the court will bear with me a few moments, I will bring that out.

The Court: All right.

Mr. Green: American Seating Company, when they realized that Murphy wasn't going to pay, then took up the matter with Murphy. Murphy claimed he hadn't been paid by Grandy yet.

Mr. McCall: Will you give the dates for that?

Mr. Green: The exact dates I don't think are material [21] until we come to the dates that are material.

Thereupon American Seating Company contacted

Mr. Grandy and found out Murphy had been paid, and on December 1, 1950, wrote a letter to the Glens Falls Indemnity Company, in which it made demand for payment under the payment bond that had been filed.

Mr. McCall: That was December 1, 1950?

Mr. Green: That was December 1, 1950. And attached a copy of the sales invoice for the material, and sent it by registered mail, and was receipted for by Glens Falls Indemnity, by B. McGee.

A copy of the letter was also sent to E. F. Grandy, Inc., and to Eva L. Cole, Cole Insurance Company, and a copy to Miss Ruth Casalini of the San Francisco office.

We offer this to be marked as Plaintiff's Exhibit 12 for identification.

Mr. Sturr: Just as a query, whose San Francisco office? San Francisco office of what?

Mr. Green: I don't know.

The Court: Do you want to answer that, Mr. Green?

Mr. Green: I said I don't know, your Honor. It just says "San Francisco Office" on the bottom. I don't think it is material. That might be the San Francisco office of the American Seating Company.

The Court: Plaintiff's Exhibit 12 for identification. [22]

(The document was thereupon marked Plaintiff's Exhibit No. 12 for identification.)

Mr. Green: Under date of January 3, 1951, Glens Falls Indemnity Company wrote a letter to the American Seating Company, which I will ask be

marked Plaintiff's Exhibit 13 for identification. In this letter—well, the letter speaks for itself.

(The document was thereupon marked Plaintiff's Exhibit No. 13 for identification.)

Mr. Green: One further statement of fact was that sometime around December 1, 1950—I don't have the exact date, but I don't think the exact date is material—the American Seating Company called Glens Falls Indemnity Company about this matter, and were told by them that before they could collect on the bond, they would have to sue Murphy and get a judgment against him.

Mr. McCall: I would like to object to that going into this record.

The Court: You dispute that?

Mr. McCall: I dispute that strongly.

Mr. Green: We know he disputes it.

The Court: We want to just smoke out the dispute. Now we have a disputed fact.

Mr. Green: I don't think that is a material matter, substantially. [23]

The Court: You can determine whether it has sufficient materiality to lay a foundation for it and establish it as against a dispute, or not.

Mr. Green: And they were told by the Glens Falls Indemnity Company that they should first get a judgment against Murphy and they would proceed against Murphy, but the judgment has never been collected, and, so far as I know, Murphy is insolvent and it is uncollectible.

Mr. McCall: Your Honor, before he goes to something else, would the court please require counsel

to state who called and who answered? He says the plaintiff called the company. That doesn't mean anything. Who did they call and who did they talk to? We have no knowledge for meeting the issue if he just says the plaintiff called the company.

Mr. Green: We don't have to give counsel issues to meet now. We claim what the facts are now, and if he disputes that, let him take care of it by interrogatories or deposition, if he wants to find out.

The Court: Customarily, counsel urging a fact of this kind will, in a pretrial, divulge it. If you do not wish to divulge it, you do not have to.

However, it is his privilege to reach it by interrogatories, which the court would require be answered, what the evidence is, who called, who talked to whom, and so on. [24]

Mr. Green: The only reason I am not stating it right off is that I don't have the fact right at hand. I can find it.

The Court: If you can find it, let him know. I don't mean to prejudge this, but just offhand I don't think it makes any difference.

Mr. Green: I don't think so, either.

(At request of counsel for the respective parties, discussion between the court and counsel concerning the status of the Farmers & Merchants Bank of Long Beach, which ensued at this point in the proceedings, is omitted from the transcript.)

Mr. Green: I have the checks paid by E. F. Grandy to V. L. Murphy and the Farmers & Merchants Bank. They can be marked for identification.

Mr. McCall: I would like to object to those even being marked for identification until they are returned to Mr. Grandy so that he can get the photostat copies of them. Those are the checks Grandy tells me he has been after plaintiff's counsel to return to him for many months, and they refused to return them.

Mr. Green: That is not true. He never asked.

The Court: You can get photostat copies here. The clerk's office provides photostat copies of anything in our file, exhibits or otherwise, at rates that I think are a [25] little below the usual commercial rates.

I think these things should be in our records, but if you would rather take them to your own photostat facility, we will ask Mr. Green if he has objection to letting them out for that purpose. Do they come from your file?

Mr. McCall: They were in the file that they got from my client, Mr. Grandy, and never returned all the file to him yet.

I have no objection to them going in here for identification, and I will get my photostat copies for Mr. Grandy. He has been needing those for some time, and I shall take it that the photostat copies will do just as well.

The Court: That photostating facility is available, Mr. Clerk, is it not, for exhibits?

The Clerk: Yes, your Honor.

The Court: Then give them exhibit numbers for identification.

Mr. McCall: Will they all be numbered together?

The Court: Let us number them as one exhibit.

Mr. McCall: How many are there, Mr. Clerk?

The Clerk: Six.

Mr. Green: Maybe I can save time if you want to stipulate and then you can have the checks back right now.

The facts show the following payments were made by [26] E. F. Grandy, Inc. to V. L. Murphy and the Farmers and Merchants Bank in connection with this subcontract:

July 8, 1949, $3182.40.

August 22, 1949, $4369.50.

October 25, 1949, $2152.72.

January 5, 1950, $3715.71.

February 1, 1950, $2166.74.

July 17, 1950, $1421.37.

Do both counsel agree?

Mr. Horn: I couldn't follow that fast.

Mr. Green: Well, I read the checks correctly.

Mr. Horn: I know you read them correctly, but I couldn't follow you that fast.

Mr. McCall: On behalf of defendant E. F. Grandy and defendant Glens Falls Indemnity Company, I will stipulate these checks are the originals, and that they were paid to V. L. Murphy Plumbing Company and Farmers and Merchants Bank according as shown on the face thereof.

Mr. Horn: I don't recognize the name J. L. Leonard, but we can enter into the same stipulation.

Mr. Green: May the record show I have turned over to Mr. McCall those checks?

The Court: You are surrendering them?

Mr. Green: I am surrendering them to him.

The Court: The checks are deemed surrendered to Mr. [27] McCall by Mr. Green.

As I understand it, all parties have entered into a stipulation that the amounts of money that the payee and payor, that Mr. Green has immediately stated in the stipulation, is conceded by everyone and deemed a stipulation, and may be considered such at the trial of this action?

Mr. Green: Yes.

Mr. McCall: Yes.

Mr. Horn: Yes.

Mr. Green: Incidentally, I have found in my file a memorandum as to who in the Glens Falls Indemnity Company talked to our man about the getting of the judgment; just to advise counsel, it was Mr. Sampson in the Claims Department.

Mr. McCall: Do you have the date of that, Mr. Green?

Mr. Green: No, I don't. I just have the memorandum of the conversation.

Mr. McCall: Who was it that talked to him?

Mr. Green: I don't know that either.

Mr. McCall: You just have a memorandum?

Mr. Green: I just have have a memorandum that such conversation took place, and I don't know who did it. I believe, your Honor, without limiting myself to things that may occur to me, that those are substantially the material facts in this case.

If there is any dispute about them or any addi-

tions [28] to them, I would like to hear from counsel.

Mr. Horn: Are you going to put the letters in?

Mr. Green: I have put in the gist of them.

Mr. Horn: All right.

The Court: Do you mind stating your legal theory as to the bank? I don't quite get how they tie in with a legal responsibility to your client.

(Further discussion in regard to status and position of the Farmers & Merchants Bank omitted at request of counsel.)

Mr. Green: Now I would like to ask Mr. McCall a question.

Do you have any other facts to add to the statement of facts we have agreed to?

Mr. McCall: Yes, I do.

Mr. Green: May I hear what they are?

The Court: Yes; I was going to ask Mr. McCall, what is the defense contention? What facts are there in the defense that are not apparent in the plaintiff's facts?

Mr. McCall: Since it is understood that none of the exhibits that have been put in here for identification, with the exception of those which we admitted, to wit, the exhibit, the subcontract, the payment bond, and the performance bond, we admit those and have no objection to them going into evidence. All the other things, the [29] photostat copies and so forth that counsel put in, of course, we haven't seen them and we don't admit anything.

The Court: You state now you are not in a posi-

tion to admit either the genuineness of the documents or the fact of delivery?

Mr. McCall: That is right; or if it is relevant. That will be for the court to decide.

The Court: We will have to decide relevancy at the trial. These other things should be decided before the trial. So, if you are going to deny the due execution, validity of the copy, and delivery of the document, Mr. Green can be prepared with his foundation proof at the time of trial. Otherwise where we can eliminate foundations at pretrial, we should.

There has been some indication of a desire to take further depositions. We should probably pretrial this again afer you have had that experience.

Mr. Green: Yes; but, counsel, I want to know what you admit and don't admit, so I can know on deposition what I have to go into. Before doing that, counsel should answer the court's question as to what defense he has to this case, if any.

The Court: I understand counsel is going to admit the genuineness of the documents and delivery as to some, and as to others he feels he should confer with his client before [30] doing so.

Mr. McCall: I admit the genuineness of the subcontract and the two bonds that have been produced here. I might say I have received from Mr. Grandy, and in my rush to get away from my office I left it on my desk, the duplicate original of the contract between Grandy, Inc., and the Federal Government, and which includes the performance bond and the labor and material, both. I think

they will be material later on, so I would like, if the court please, and I am sorry I didn't bring it with me, but I do have this in my office, but I just got it this morning.

Mr. Green: If you will stick to one thing, Mr. McCall, so we can get this in an orderly fashion, I will appreciate it and the court will appreciate it.

The court asked you a question as to which of these exhibits which have been admitted for identication you admit are genuine and which you claim are not, or which you claim you don't know and you will notify us later.

The Court: The term "genuine" includes delivery, doesn't it?

Mr. Green: Yes.

The Court: Can you tell us about any other than the bonds, which you have admitted?

Mr. McCall: I see a letter here for the first time. I am trying to read it a little bit. He has asked me as to [31] genuineness.

The Court: Take your time.

Mr. McCall: Thank you.

Did you put in, counsel, a photostat copy of this letter yet?

The Court: Are you referring to Exhibit 13?

Mr. McCall: No, this isn't even in for identification.

Mr. Green: It is marked for identification, if you will look on the other side.

Mr. McCall: That is genuine. What number is that?

Mr. Green: 13.

Mr. McCall: 13?

Mr. Green: Yes.

Mr. McCall: This one here, entered as Plaintiff's Exhibit 12, I would say that is genuine.

Mr. Green: All right.

Mr. McCall: It is entirely possible all these others here represent letters or documents that were written and received as they purport on their face. I just don't know. I will go over them with Mr. Grandy. I will get him to come up here.

The Court: After you get him to come up here, will you notify all counsel in the case and the court?

Mr. McCall: Yes; as to which ones.

The Court: As to which ones are. [32]

Mr. McCall: Yes.

The Court: I think that is probably better than having a meeting here just to do that.

Mr. McCall: Yes; why, certainly. I am quite sure they are what they purport to be.

I would like to ask counsel if he has the originals of those.

Mr. Green: No; they are all in Grandy's file that were returned to Grandy. If you have the file with you, if you will look in it, you will find the originals.

Mr. McCall: I don't have Grandy's file, but he will bring it to me. At the time I talked to Mr. Grandy, he was in the office with his files, but he didn't have much of his file then.

I have a statement of facts, your Honor.

The Court: Go ahead and make it.

Mr. McCall: On March 5, 1953, we filed on be-

half of Glens Falls Indemnity Company, defendant, and E. F. Grandy, Inc., a defendant, a document in this case marked Pretrial Brief of Defendants Glens Falls Indemnity Company and E. F. Grandy, Inc., which has a purported statement of facts beginning on line 23 and ending on line 22 on page 2.

The Court: No; it begins on line 22 on page 1.

Mr. McCall: Yes; page 1.

The Court: And ends on line 22, on page 2. [33]

Mr. McCall: Yes; and ends on line 22, on page 2.

The Court: Yes.

Mr. McCall: Which is our statement of facts, with the exception of line 6 and that part of line 5 beginning after the word "surety," to the word "to." That is a conclusion and should be stricken from the facts now.

That reads: "to protect E. F. Grandy, Inc. in the event it suffers a loss by reason of the subcontract"——

The Court: You just mixed a little of your argument there.

Mr. McCall: That is right. So, for the statement of facts, that should go out, because it is a conclusion. But all the balance of that we claim is a statement of facts.

Since that is in the record, it is not necessary to read it into the record, I assume.

The Court: No. We will take it from here.

However, if you have anything further or want to elaborate on the details of this, you may, if you want to. You don't have to.

I notice that all statements of fact which have been given here this morning, and I mean by that your written statements as well, do not make any issue of whether or not the labor was performed and the material furnished in the amount claimed.

Mr. Green: That is agreed upon. [34]

The Court: It is agreed upon?

Mr. Green: There is no dispute as to the amount we are suing for.

Mr. McCall: I think that is in our admissions. It is in the file. I haven't checked them.

The Court: I haven't checked through the admissons, but frequently in these cases, as in mechanic's lien cases, there is an issue.

Mr. Green: That isn't an issue.

The Court: That eliminates a phase of the case that usually takes time. I am glad it is not present here.

Mr. McCall: There is a small amount, but not enough to talk about. The question here is strictly one of law.

I might say right now that the statement of facts that Mr. Green for the plaintiff gave here, if you will strip it of all of the conclusions, I believe it is correct, completely.

The Court: In view of the way the facts have developed in this pretrial, we may have a case here for motion for summary judgment. I am not saying you should do that, but I think you should consider whether to do it or not, provided, of course, that you stipulate that on the motion for summary judgment the transcript of the proceedings here today

would be a proper document for the court's consideration. Otherwise, the trial is going to be largely a repetition of [35] what we have had here today so far as presentation of facts is concerned.

Motion for summary judgment affords you, or will afford you, the same opportunity for briefing and argument that a repetition of these facts would do in the courtroom.

Mr. Green: I thoroughly agree, and I believe Mr. McCall agrees, this is a matter for summary judgment.

Am I correct in that assumption, Mr. McCall?

Mr. McCall: Yes, we have talked about that.

Mr. Green: So far as the briefs are concerned, do you intend to file any additional briefs than what you have filed?

Mr. McCall: After the facts have been stipulated to, it might be well for us to file further briefs.

Mr. Green: If you want to do that, that is all right.

Will you agree to this: that we may, without making a written motion for summary judgment, that we can at this time, so far as the defendants you represent are concerned, make a motion for summary judgment?

The Court: The rules won't permit it to be made orally.

It is all right with me, but the Court of Appeals for the Ninth Circuit has found upon that practice and has declared that a motion for summary judgment must be in writing, stating with great par-

ticularity exactly upon what it is based. So it really makes for a more orderly [36] process.

Mr. Green: I agree.

The Court: I have just had an experience with a surety-ship case, where the surety made a motion for summary judgment and the defendant did not. However, in the brief and in the argument it developed that there was a question of novation, which established an absolute defense.

On considering the plaintiff's motion for summary judgment, I wrote a memorandum on it that I gave the clerk just yesterday, and I decided that the surety company which was trying to collect, had substituted a note for the liability on the bond which had been discharged in bankruptcy.

Hence, the surety company couldn't collect from its client, but the defendant didn't file a motion for summary judgment on its behalf.

Mr. Green: May I suggest this—I think it would simplify this case—instead of a motion for summary judgment we can merely submit the case to the court for decision on the facts?

The Court: You could do that?

Mr. Green: And then you don't have the technicalities of summary judgment on one side or the other, but this way the court can find the facts and decide the law.

I don't imagine counsel would have any objection [37] if we hold the action as against the bank in abeyance; in other words, separate those two issues for trial; and as far as we are concerned, if we recover a judgment against these defendants,

we are not interested in pursuing it against the bank. If we don't, then, of course, we are interested in pursuing it against the bank.

The Court: They are kind of standby defendant.

Mr. Green: That is right. Do you have any objection to that, of being a standby defendant?

Mr. Horn: Can I interpose something?

The Court: Yes.

Mr. Horn: I am still sitting here in a fog as to why we are in this lawsuit. I would like very much if I can have some information about that. I get nothing from Mr. Green's brief. He gives me no law at all.

I have nowhere to start. I am not any type of magician, but just a plain lawyer.

The Court: Mr. Green is suggesting that he and Mr. McCall submit their case, stipulating that there be a severance as to you, and indicating, in the event the plaintiff should win in this case, he would dismiss as to you.

Mr. Horn: Is that proper under the procedure?

The Court: Yes. However, in case the defendant wins on the present submission, then we will try the case as to you.

Yes, it is possible under our procedure to [38] sever and try issues piecemeal.

These proceedings in chambers have been informal, but after the close of this pretrial we have had this morning, it appears that the facts are now all before us.

I do not want to cut you off, however. If you want a formal trial, by all means we will calender

this for some day shortly, and you can go ahead. Otherwise, you may stipulate, if you wish, that upon counsel for defendant giving counsel for plaintiff a letter and giving the court a letter admitting the genuineness of certain documents which he says are probably genuine, but which he wishes to verify, that the cause will then be submitted on whatever briefing arrangement or oral argument you wish to make.

Mr. Green: I would like to have oral argument. If the court could set a day for argument, both as to the facts and as to the law, I think that is all that would be necessary. Then the court could make a final determination.

Mr. Sturr: I think we still would like to submit a brief.

Mr. Green: I have no objection if you want to submit other law; but, frankly, unless you submit something new, I am satisfied to let the matter stand submitted.

The Court: Do you want to argue the matter before or after the briefs? [39]

Mr. McCall: I don't care about arguing, for the reason if we agree on the facts it would be a matter of law. We could submit that to the court on our briefs and the court can have plenty of time to read them over, and if the court wants argument, the court can order us in for argument. Is that sufficient?

Mr. Green: Before the court rules, I would like to express myself, if I may.

The Court: Yes.

Mr. Green: If counsel has any further briefing to submit, I would like to be given the opportunity to answer such a brief, if it needs answering.

I would like the court to set a day for discussion, with the understanding that we can sever it so far as the bank is concerned until our case is disposed of.

The Court: I always feel if there is a substantial question, or if any party feels there is a substantial question and wants oral argument, we should have it.

When I was in practice, I always resented appearing before one of the district courts of appeal here, which would come out and call the calendar and if you did not say, "All right," when they suggested it be submitted, they would sandbag you into it.

On the other hand, if you go to the division of the District Court of Appeal in San Francisco, where Justice [40] Peters sits, and if you say, "We submit the matter without oral argument," Justice Peters will sandbag you into making an oral argument.

I have found out later the reasons for that. The judges here have their conference with respect to the case at such a remote time to the day of argument that they feel that what happens in the courtroom in the way of argument is probably forgotten by the time they meet to confer.

Justice Peters, in his division, and our court of appeals in its, have conferences before they ever hear argument, and immediately before, and then

they have a conference on the decision immediately after the argument. Hence, it is quite practical.

I always feel here that I am benefitted by oral argument, if counsel really makes an argument and not a speech.

Mr. Green: Let us see what we have accomplished. May I summarize my understanding?

The Court: Yes.

Mr. McCall: Before we have a summary, I had just given my version of the facts in the case, what I claim constitute the facts, and I would like to know, since counsel has a copy of this, does he agree that the facts that I just pointed out here are the facts in the case; and, if not, [41] what is there in my brief that is not a fact?

Mr. Green: That is a fair question and I will answer it in a minute.

You don't have the date in June when the contract was accepted by the Government?

Mr. McCall: I do not have that date any place.

Mr. Sturr: Can we say sometime in June?

Mr. Green: I think so.

The Court: It would seem to me it would have the same legal effect if it were any date in June, even a Sunday.

Mr. Green: I take exception to this one statement on line 12 on page 2, where you say, "were paid in full by E. F. Grandy," as a conclusion. I have no objection to that fact being "were paid the full amount of the contract price by E. F. Grandy."

Mr. McCall: All right. I will be glad to make

that "were paid the full amount of the contract price."

Mr. Sturr: Subcontract price.

Mr. Green: "Were paid the full amount of the subcontract price."

Mr. McCall: "——were paid in full"?

Mr. Green: No, not in full. I object to that. "Were paid the sum of $16,667.05."

Mr. McCall: Is that the full amount of the subcontract [42] price?

Mr. Green: Yes; but I don't like the phrasing.

The Court: Mr. Green wants to follow pretty well the practical rules to avoid stating it in conclusion form, although he states an ultimate fact which leads us to a conclusion.

Mr. Green: The mere fact they paid the sum of $16,667.05 doesn't mean they paid in full for the contract, if they owed American Seating Company so much money. So, instead of "in full," I agree the amount of $16,667.05 was paid.

Mr. McCall: Make it "was paid the amount mentioned in the subcontract."

Mr. Green: That is longer than what I just said "were paid $16,667.05."

Mr. McCall: All right. Now, is there anything else to be stricken there?

Mr. Green: Just "in full," and substitute $16,667.05.

Mr. McCall: I don't think there is any objection to that. It is the same thing.

The Court: All right. I assumed there would be no objection so I have written it here, already.

Mr. McCall: Anything else you object to, Mr. Green, in the statement of facts?

Mr. Green: No. I don't claim they are all the facts, [43] but I don't object.

The Court: You feel, correlated with the facts you have stated here today, they are all the facts?

Mr. Green: Yes, they are, and I am willing to submit the case to the court on the correlation of both statements of fact which have been agreed upon, and the exhibits we have had marked here, so far as the defendants Glens Falls Indemnity Company and E. F. Grandy, Inc., are concerned.

The Court: That is assuming your opponent finds it possible to agree to the genuineness of the documents, which he has reserved.

Mr. McCall: There is a further point there, your Honor. We, I am sure, couldn't agree they are relevant or material.

The Court: I understand. Counsel's objections as to materiality and relevancy will be treated, I take it, either in the briefs or on the day of oral argument, or both.

Mr. McCall: All right. I will get Mr. Grandy up here, and we will look over these and see if he admits they were all received by him, or sent to whomever they purport to have been sent. There was some correspondence between Murphy, the subcontractor, and the plaintiff here, American Seating Company, and it might be that Mr. Grandy knows nothing one way or the other about it; and, if not, I will so state in my letter to the court and counsel.

The Court: All right.

Mr. McCall: Will it be sufficient if I write a letter to counsel or write it to the court?

Mr. Green: Write it to the court and send me a copy.

The Court: Technically, it should be sent to the court with a copy to counsel.

Mr. Sturr: Would it be agreeable to you, Mr. Green, if you can find the information to supply us with the information as to who made the call?

Mr. Green: That is a fact in dispute anyhow.

The Court: It is a fact in dispute upon something that isn't in issue.

Mr. Green: I will withdraw that. If we are going to submit the matter to the court this way, I won't even put that in as an issue.

Mr. McCall: You mean whether there was a phone call?

Mr. Green: Yes.

Mr. McCall: You have nothing in the record to substantiate that.

Mr. Green: I said that it was a fact——

Mr. McCall: You can withdraw it orally.

Mr. Green: Understand, I am not withdrawing it from the case, if we have to try the case, other than by submitting it on the stated facts we have now, and the court can ignore the question and eliminate from consideration any [45] question of the telephone call.

The Court: The court is to consider the facts in this case to be the facts recited in the pretrial brief of defendants Glen Falls Indemnity Company and E. F. Grandy, Inc., and the facts which have

been stated this morning by plaintiff, eliminating from such consideration all that has been said by either party about the telephone call.

Mr. Green: Yes.

The Court: If, however, the court should feel, or either party should feel, before the date we announced for trial, that there should be an actual trial as to the facts, then the matter of the telephone call is not prejudiced by what I have just said, but may be gone into.

Mr. Green: I reserve the right to present that at such time, if I decide to do so.

The Court: And I reserve ruling on whether it is material and relevant.

Mr. Green: In order to expedite counsel's work, I am handing him herewith these exhibits that have been marked Plaintiff's Exhibits 5, 6, 7, 8, 9, 10, and 11, for him to take and discuss with his client, and I will ask him to return those to me with the letter in which he advises us concerning their authenticity.

The Court: They are exhibits in the custody of the clerk. [46]

Mr. McCall: You don't have copies?

Mr. Green: No.

The Court: You are offering to stipulate, Mr. Green, that they may be withdrawn for the purpose of counsel determining with his client the genuineness, so he doesn't have to bring his client to the Federal Building, and will thereafter be returned to the files?

Mr. McCall: Mr. Clerk, have those been identified by you so that you can identify them?

Mr. Green: Mr. McCall, just a moment; I withdraw my offer. You come up to the court and see them. I don't seem to be able to agree with you even as to the time of day.

Mr. McCall: I want to know if they are identified by the clerk.

Mr. Green: Forget it. Withdraw it. If you want to see them, you come up to the court and see them.

Counsel for the bank has handed me the assignment, and wants it put in the file, and I will offer this as Plaintiff's Exhibit No. 16.

The Clerk: Plaintiff's Exhibit 16 for identification.

The Court: The court will now make this order, that we will try this case as to the defendants excepting the bank, and will excise from that trial all consideration of the bank; and if plaintiff desires to proceed as to the bank, that notice shall be given the court within ten [47] days after the notice of the court's decision, and the court will then have it placed on our setting calendar for trial as to the bank.

The bank need not appear at the trial which is about to be set.

It is understood, pursuant to stipulation, the court will consider the statement of facts with the exception of the deletion I have indicated, which has been made by counsel for the plaintiff, and the statement of facts which has been filed in writing by the defendants and which he has adopted by ref-

erence, rather than restatement, as the evidence in the case.

The court will consider the exhibits which have been introduced today, providing that the genuineness of certain of them which counsel were not prepared to concede is hereafter conceded by letter; and that on the trial of this case we will try the issues of law, counsel briefing those issues in advance of trial and appearing for such argument as they feel is indicated, and for such questions as the court might direct to them at that time.

It is also part of the order, and I understand it is the desire of counsel and so I make it a part of the order, that the pretrial briefs will be considered as a part of the argument in the case.

You haven't stipulated to it yet, but unless you [48] have some objection, I will make it part of the order, that all admissions and interrogatories on file will be considered as introduced in evidence.

I don't know if there are any, but usually in a case of this kind there are.

Mr. McCall: Yes, there are.

The Court: And I take it from the fact that they are not disputed, that you have liquidated that particular issue to your satisfaction by interrogatories.

Mr. McCall: Yes.

The Court: How long do you want for filing further briefs?

Mr McCall: Your Honor, it is my understanding that possibly when we go over the facts and brief this and submit it to the court, that the court

might set a time for argument, and that would be all we would have; is that right?

The Court: I understood you wanted to brief it. Mr. Green wanted to argue it orally.

Mr. McCall: Yes; after we brief it, I understand he wants to argue it.

Mr. Green: Maybe I won't.

The Court: Let us fix a day for the argument and have a day fixed for the filing of the briefs.

Mr. McCall: I think it is unfair to the court to have [49] to talk about these facts here that the reporter has taken down, without them first being transcribed, and I am just wondering if all counsel here would want to contribute to the reporter to transcribe these notes, so that we can get together and possibly cut out a lot of them and settle on the real facts.

The Court: You are suggesting you prepare an agreed statement of facts rather than the Judge wading through the full transcript?

Mr. McCall: Yes.

The Court: Actually, this is not a particularly long transcript, and having noted how you get on each other's nerves it seems to me a mutual attribute here, and I don't want to get you into further fights. If you wish to do that, it is agreeable to me; but unless you mutually request it, I would suggest that you let me wade through the transcript. It will not be such a difficult task. This has been a relatively short proceeding.

Mr. Green: The question the court asked you is how much time you want.

Mr. Sturr: We would like to know when the reporter can get a copy of the transcript to us.

Mr. Green: We would like to have the transcript for the satisfaction of preparing our own brief.

The Court: I would like, then, for you in your briefs to [50] brief the facts as well as the law. Spell out what the significance is of anything upon which you rely or which you contend is not what is argued by the other side to be. Take your time. I don't want to rush you. Of course, you want to get your lawsuit decided. I want to decide it as expeditiously as you would like to have it decided, but you tell me how much time you want.

Mr. McCall: We could cut this down if counsel wanted to hand in his prepared statement, just like we did, and say, "Here is our statement," and we will cut out all the conclusions. If he will write it up, we will agree to it.

Mr. Green: Counsel, the question is how much time do you want to write a brief?

The Court: We have a record here. It is not, perhaps, an Emily Post record, but it is a good legal record.

Mr. McCall: I would say, or I would presume that plaintiff has the first shot at the brief.

Mr. Green: We are willing to submit it on the briefs filed. If you want to file any more briefs, I want to know how much time you want, and if I want to answer, I will ask time to answer.

The Court: You are standing on your opening brief?

Mr. Green: Yes. We will stand on that, on our opening and reply briefs.

Mr. McCall: I would say ten days, and it may be that [51] after——

The Court: The court will order that either party may, but need not, file any brief in this matter within 20 days of the receipt of the transcript.

The reporter will notify the court when the transcript is prepared, and I will have a copy of it.

Within ten days of the filing of any brief which any party desires to file, the opposition may file the reply brief thereto. That will give us about 30 days from Monday.

Then we will set a day for trial, it being my understanding that in all probability after the examination has been made of these documents, all we will have to try is the issues of law and not take evidence.

So, we can, I think, set it down for some one day.

Do you want a lot of time for argument, or is it something that can be argued in a morning or in an afternoon?

Mr. McCall: Either one, half a day.

Mr. Green: Half a day would be sufficient.

The Court: It is rather easy to fill in a half a day. You are going to take the month of April for your briefing. Do you have your calendars with you so we can determine a convenient time in May?

Mr. Green: What about May 1st?

The Court: I could give you Friday afternoon, May 8. It is rather difficult to hit upon any day prior to May 8 in [52] the month of May, because

of other things I have placed on our calendar, but we can give you Friday afternoon, May 8, if you want to work on a Friday afternoon.

If counsel find themselves involved in some conflict which they would like to resolve by continuance, bring up a stipulation and we will continue the matter. If you cannot stipulate on it, bring up a motion for continuance.

Mr. Horn: Do I understand, in the event judgment should be for plaintiff against Grandy and the Glens Falls Indemnity Insurance Company, that we will be having forthcoming a dismissal as to the bank?

Mr. Green: When the judgment is sustained, when we get our money.

Mr. Horn: When you get your money?

Mr. Green: When the judgment is final, I will dismiss the case against you.

Mr. McCall: If the court decides he does not want it submitted piecemeal, he will advise all of us and the bank will come in.

Mr. Green: We would decide that. Mr. McCall isn't making the order. The court is making the order.

The Court: The clerk will make appropriate minute orders on today's proceedings, and this transcript, the original, will be delivered to the court and will be filed in the action. That will suffice, so far as the court [53] is concerned, for the pretrial order. But any party may, if it desires, reduce any order the court has made today to a formal order in writing, and may file such formal order after

having secured the approval of opposing counsel.

Los Angeles, Calif.; May 8, 1953; 2:00 o'clock p.m.

The Clerk: American Seating Company vs. Glens Falls Indemnity Company, et al. No. 14,305-T, for trial.

The Court: Are you ready?

Mr. Green: Plaintiff is ready.

Mr. McCall: Defendant is ready.

The Court: I don't recall who it was, but someone called up saying that they wanted to offer some more evidence in this case.

We had a pretrial and I understood the documents which came in at pretrial were admitted in evidence and constituted the whole evidence in the case.

However, if anyone has any additional evidence the court will not be a stickler for standing upon that understanding we had at pretrial that the evidence was in.

So go ahead and put it in.

Mr. Sturr: I was the one that did that. There was a letter from the plaintiff's manager here in Los Angeles to the defendant Glens Falls Indemnity Company that was referred——

Mr. Green: We have no objection, so, to save time, put it in evidence.

The Court: Go ahead and put it in evidence.

Mr. Sturr: That plus the prime contract. [66]

Mr. Green: No objection to the prime contract.

The Court: All right.

Mr. Green: We have just one thing to add if I may.

The Court: Let us take these defendants' exhibits first.

The prime contract and the letter, where are they?

Mr. Sturr: The letter was sent to your Honor two days ago and the prime contract was submitted to you personally in your chambers the first of this week.

The Court: The contract was what I asked you to take to the clerk's office?

Mr. Sturr: Yes.

The Court: The letter and the contract are here and also the letter of transmittal.

I will take the letter away from the letter of transmittal and ask the clerk to mark this as the defendants' exhibit next in order.

The prime contract which I have taken the liberty of going through, although it was not in evidence, it was apparent it was going to come in, but I have gone through it in order to get some familiarity with it, but it will be marked now as defendants' exhibit next in order.

The Clerk: The letter is Exhibit A and the contract will be B. [67]

(The documents referred to were received in evidence and marked Defendants' Exhibits A and B respectively.)

[See pages 174-175.]

The Court: Now plaintiff wants to put something else in.

Mr. Green: This is not really putting anything in evidence except counsel's answer to the interrogatories originally made were subsequently amended in a letter to me and I could either read the amendments into the record or just put this letter into evidence which would simplify it.

The Court: You are trying the case, so do whatever you want.

Mr. Green: I would like to offer at this time defendants' answer to Interrogatory No. 4 to read as follows:

Where it shows $61.37 at line 12, it should be $6124.37.

In Interrogatory No. 5 at line 17 where it says No. 6-16752 and Spec. 2-656, it should read, NOy 16752 and Spec 20656.

The answer to Interrogatory No. 8 is an admission that the defendant did have a copy of the purchase order.

Mr. McCall: Could I object to that? Counsel started out to read this and he makes conclusion that it is an admission.

To save time I would suggest that both the plaintiff's letter and the defendants' letter be introduced in evidence.

Mr. Green: Agreed.

Mr. McCall: No objection.

The Court: All right, you have agreed on that procedure. [68]

So, hand them to the clerk, who will mark them plaintiff's and defendants' next in order in each instance and will be received in evidence.

The Clerk: Plaintiff's Exhibit 17 in evidence.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 17.)

[See page 172.]

Mr. Sturr: This is the letter to which Plaintiff's Exhibit 17 is a reply.

The Clerk: Defendants' Exhibit C.

(The document referred to was received in evidence and marked Defendants' Exhibit C.)

[See page 176.]

Mr. Green: Just so the record will be clear, we offer these exhibits that were marked at the pretrial.

The Court: Each and every exhibit which was offered at the pretrial is admitted in evidence.

It is my recollection of the pretrial which was quite extended in this case that counsel were agreeable to their going into evidence at that time.

Understanding that they were in evidence I have read them all, but if I was wrong on that and they were only intended for identification they have now been offered?

Mr. Green: Yes, your Honor.

The Court: Then I will receive them.

Were you going to object?

Mr. Sturr: Yes. [69]

The Court: Then I will set aside the ruling that they may be admitted in evidence long enough to hear your objection.

As I recall, we said at the time of the pretrial it would be impossible to finally determine the rele-

vancy and materiality of these documents until we had heard the case.

Mr. Sturr: May we reserve our right to object to them?

The Court: We are hearing the case now and you are objecting now, is that right?

Mr. Sturr: Yes.

The Court: I will reserve ruling until we have heard the case and have heard your objections.

Mr. Green: Based upon the stipulated facts, your Honor, that were stipulated to in the pretrial and the exhibits that we have offered on the assumption that they will be received, we rest our case only with this change that when the admission of the defendant as to the amendment involving changing the figure $6124.37 to $6356.

The Court: Is that what you are asking the court to give you?

Mr. Green: Yes, your Honor, plus interest at the rate of 7 per cent since the date asked for in the complaint.

The Court: What is that date?

Mr. Green: 1st of June 1949.

With that we rest.

Mr. McCall: Do we understand counsel of plaintiff is [70] asking to increase the amount sued for in the complaint?

I do not have the complaint before me.

Mr. Green: Your understanding is correct. The amount should have been $6356. As you answered in the interrogatory.

The Court: You move to amend your complaint?

Mr. Green: I move to amend my complaint to conform to that proof.

The Court: The motion to amend the complaint is granted, but you had better take the complaint and amend it by interlining that.

Initial the interlineation.

Any further evidence by the defendant to be offered?

Mr. McCall: I was just waiting for Mr. Sturr, associate, to return to his seat so as I could ask him what he has found there.

As I understand, the interrogatories were signed by Mr. Grandy.

The Court: We will stand in recess until 3:00 o'clock.

(Recess.)

The Court: You may proceed.

Mr. McCall: May it please the court, if we have the facts in mind we would also rest.

I will see if I remember the facts as they are.

I have been out of town practically all the time since we had our pretrial. I would be called out for a few days [71] and then come back.

As I remember, at the pretrial your Honor suggested either side who wanted to could file a brief and then we would have the argument.

Since I was out of town so much Mr. Sturr took the matter up with the clerk, I believe, to find out if we could get another date, get the time extended to another date, but, as I understand, that did not suit the calendar of the plaintiff's attorneys and for that reason your Honor held that we would have

the argument on it today and then we could file briefs if we wanted to.

If my understanding is correct, our Honor, we also rest with the exception of the brief in question.

The Court Is it understood that the record of the pretrial here is also a part of the record of the trial?

Mr. Green: I so understood.

The Court: I understood at the pretrial we made it so.

Mr. McCall: I believe so. There was some question about the facts. Of course, the court has that record and can weigh the facts.

The Court: Yes.

Mr. McCall: There is one more thing that the court has to decide, I think, to wait until the briefs are all in, and that is whether or not the exhibits for identification will be introduced in evidence.

The Court: Yes.

Mr. McCall: We have objected on the grounds which are in the record, to some of them, and some of them we have specifically marked as those we would like to go in evidence.

The Court: Yes. Your objection goes to relevancy and materiality?

Mr. McCall: That is right, your Honor.

Mr. Green: Since all the evidence is in then I ask the court to rule on the exhibits. We want to know whether we have a case made or not.

The Court: Actually this type of objection goes to your ultimate decision in the case because it is

understood the foundation is there for the exhibits. It is simply a question whether they prove anything.

Mr. McCall: Yes, your Honor.

Mr. Green: The point is they go to the probative value that the exhibits have.

If counsel has any objection on any ground to the exhibits he ought to state those objections, and we should have those decided by the court at this time as to materiality or relevancy since we do have the foundation and we have offered them in evidence.

Also, if I may, I would like to comment on the fact that here my understanding was that at the pretrial we would present all the evidence to the court. [73]

The only question was whether or not counsel was going to admit the foundation for these exhibits. That has now been done.

It was provided for in the pretrial at that time that counsel would have 20 days to file any additional briefs and we have already filed additional briefs in the case and after the additional briefs in the case were filed we could argue the case if we wished.

Now, counsel says he had other business. I had other business and so did my associates and so did the court.

Now counsel says he wants to argue and then file briefs.

It seems to me that this is the day when this whole matter can be disposed of and should be dis-

posed of, I respectfully submit, if the court is fully advised of the facts and the law as I am sure the court is from the evidence already presented to the court and the briefs which have been submitted to the court.

The Court: Mr. Green, you have gone over the exhibits. I feel that I should do that in order to ground my familiarity for the purpose of ruling.

Mr. Green: Yes, your Honor.

The Court: It is still, perhaps, going to be difficult to rule with proper finality on the relevancy of a document until we have the argument.

I would like, however, for counsel to indicate at this [74] hearing which of the exhibits he objects to on the ground of relevancy and I will give that matter special study.

Then when I get to a decision on the case I will say in the memorandum that exhibit so-and-so is admitted and exhibit so-and-so is rejected.

So that you will have a record upon what I base my finding, but the nature of these exhibits is such that the question of relevancy rather than of weight to be given to these documents is what is to to be considered.

There are some things that are somewhat on the edge of relevancy in law and others that are right at the spoke of the wheel.

It is going to be difficult for me to give an absolute decision until I have heard your arguments.

Mr. Green: Yes, but if counsel has any defense he should submit it.

He has rested and now I would like to proceed to argue the plaintiff's case.

The Court: Let us get this matter of the exhibits straightened out.

Are you prepared to tell the court which exhibits you are objecting to on the ground of irrelevancy and incompetency and immateriality?

Mr. McCall: Yes. That has been made the subject of a letter addressed to the clerk and a copy sent to counsel for [75] plaintiff.

The Court: One was laid on my desk just before I came in from the recess.

Mr. Sturr: That was the letter of transmittal also of this additional exhibit.

In that regard we stated we do have no objection to Plaintiff's Exhibits for identification 2, 3 and 4, the subcontract and both bonds under the subcontract.

The Court: But you do object to which ones?

Mr. Sturr: We reserved the right to object to all other exhibits, that is, 1, and 5 through 16.

The Court: Which ones do you not object to?

Mr. McCall: We do not object to either of the letters.

Mr. Green: In view of counsel's attitude may I suggest that I do this?

I will offer these exhibits one by one and let them show the court where they are irrelevant and the court can rule on it and we will now know what the evidence shows.

The Court: You offer them and Mr. McCall and Mr. Sturr can state their objections.

If I can I will rule.

If I feel I cannot I will reserve ruling.

We will at least then have them in the record with the particular objections.

Mr. Green: We would like to first offer in evidence [76] Plaintiff's Exhibit 2 which was marked 2 for identification, which is the subcontract between Grandy and Murphy.

Mr. Sturr: We have no objection to that going in evidence.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 2.)

[See page 147.]

Mr. Green: Next we wish to offer in evidence Plaintiff's Exhibit 3 which was marked for identification at the pretrial as Plaintiff's Exhibit 3.

The Court: My notes show they were not objecting to that.

Mr. Green: Just to make it orderly——

The Court: It is received.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 3.)

[See page 153.]

Mr. Green: And the same with respect to 4.

The Court: There is no objection.

Plaintiff's Exhibit 4 is received.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 4.)

[See page 155.]

Mr. Green: We have No. 5 which is the bid made by the American Seating Company to all

contractors for this particular work in the sum of $6356. Which was received by E. F. Grandy on September 24, 1949 in accordance with their stamp [77] thereon.

Mr. Sturr: We do object to that on the ground it is irrelevant and immaterial.

Mr. McCall: That is the extent of the objection, irrelevant and immaterial to the issues of the case.

The Court: Do you want to argue this?

Mr. McCall: No, we are willing to leave this until the briefs are in.

The Court: I will admit it and you can make a motion to strike it in the briefs.

It appears to me in the full setting of this case that while Exhibit 5 does not spell victory for any party, it is not a document that you would refer to as being the crux of the case, but it is relevant with a liberal view of relevancy.

It is admitted in evidence and leave is given to you to file a motion to strike contemporaneously with filing your brief.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 5.)

[See page 156.]

Mr. Green: We offer No. 7 for identification, the purchase order from V. L. Murphy Company to American Seating Company for this material for which we are asking the purchase order which was received by E. F. Grandy on September 24, 1949——

Mr. McCall: We have no objection to that going in evidence. [78]

The Court: Received.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 7.)

[See page 161.]

Mr. Green: ——which is the letter from American Seating Company to V. L. Murphy dated August 23, 1949, which discusses the subject matter of this action, a copy of which was sent to E. F. Grandy, Inc., according to the note at the bottom and was received by E. F. Grandy on August 25, 1949.

Mr. McCall: We have no objection to that going in evidence.

The Court: That has been received.

Mr. Green: We now offer Exhibit 8 which was marked for identification as Exhibit 8, a copy of a letter from E. F. Grandy, Inc., to the officer in charge of construction relative to this particular matter and dated September 26, 1949.

This is a letter of transmittal, transmitting four copies of the purchase order for this material to the Government and was transmitted by E. F. Grandy, Inc.

Mr. McCall: No objection.

The Court: Received.

(The document referred to was received in evidence and marked Plaintiff's Exhibit No. 8.)

[See page 163.]

Mr. Green: We offer in evidence an exhibit marked for identification as No. 9 which is a letter to E. F. Grandy [79] dated December 20, 1949 from

American Seating Company discussing the subject matter of this action.

Mr. Sturr: We do feel that this is immaterial in the sense that it is nothing more than a report from this company to a prime contractor.

The Court: The Court is not satisfied of the relevancy either.

It might be relevant but at the moment I cannot say with a certainty so I will reserve ruling on that and invite your comments in argument.

Mr. Green: We offer Plaintiff's Exhibit No. 10 for identification, a letter to the officer in charge of construction from E. F. Grandy, Inc., dated December 22, 1949, enclosing correspondence, copies of correspondence from American Seating Company relevant to the subject matter of this action.

Mr. McCall: Our objection to that would go to the fact that it mentions documents which we do not have here or know what they are.

We think it is irrelevant and immaterial on that ground.

Mr. Green: It is not the documents they mention that makes it material.

The purpose of these documents is to show the notice that E. F. Grandy had of the fact that American Seating Company was the supplier of material to its subcontractor in [80] connection with this work, something counsel has attempted to deny and admit in various forms.

I want to have that clarified.

The Court: It is my tentative view that this document is admissible.

However, because there has been an objection and my view is still tentative enough that I am sort of standing on it with one foot instead of both I don't have too much confidence in my understanding of relevancy.

I will reserve ruling on this until after argument.

Mr. Green: We of course defer to the Court's ruling and agree that the Court should not make any final ruling on anything until the Court feels certain about it.

For the purpose of the record, it should show these are all photostats which the defendant has stipulated are photostats of the original documents and are true and correct.

This exhibit marked 11 for identification is a letter from E. F. Grandy dated January 6, 1950 discussing the material supplied in connection with——

Mr. Sturr: We do object to that, first, because it refers to a letter which may have some relevancy; and, second, on the ground it seems to be nothing more than a letter from the prime contractor to supply the material.

The Court: It doesn't seem to me offhand to prove anything in your case one way or the other.

How relevant is it, Mr. Green?

Mr. Green: The reason I cannot speak with authority as to how relevant it is, is because I had no idea what the defendant is going to claim as a defense in this case.

The Court: I don't either.

Mr. Green: I don't see where they have any defense.

They may bring anything.

They may say that E. F. Grandy and Company never heard of American Seating Company.

I cannot imagine what they may say.

The Court: They have rested their evidence.

Mr. Green: I know, your Honor, that is why we want to put these things in and have them in the record.

The Court: We are sort of backtracking to the plaintiff's case in order to get a record because of uncertainty as to what the present record is.

Now having any defense presented as to which this would be relevant the objection is sustained as to No. 11 with permission to reoffer if anything is presented which would make it relevant.

Mr. Green: We now offer in evidence the exhibit marked No. 12 for identification.

We will pull out No. 11.

I want to conform to the Court's idea of relevancy here so we do not burden the Court with anything that is not [82] necessary.

The Court: I see your position, Mr. Green. You don't know what they are going to argue, so you want to bring in everything you consider an answer to everything and not knowing what everything is you bring, perhaps, too much.

Mr. Green: Perhaps much of this is surplus, but I assumed when we came to court today that their position would be clear and if they had any brief they would have filed it.

These documents conclusively prove there was a contract between Grandy and American Seating Company and the reading of the bonds and our application show.

So, in order to clarify it, considering the acts of Grandy who took steps right at the beginning of this contract which virtually disabled Murphy from paying American Seating by agreeing to an assignment of those funds——

Mr. McCall: We would object to that as a self-serving argument after he has rested.

Mr. Green: Mr. McCall, all my arguments are self-serving in the interests of my clients. That is my purpose.

I want also to point out to the Court that E. F. Grandy have disabled Murphy from paying American Seating Company by permitting them to assign funds to a bank and paying the money to a bank before these goods were ever even——

The Court: Let us have the offer of evidence.

Mr. Green: We offer Exhibits 14, 15 and 16 in evidence [83] also.

The Court: Is defense objecting to Exhibits 14, 15 and 16?

Mr. Green: We also offer in evidence Plaintiff's Exhibit No. 1.

Mr. Sturr: We don't object to 14, 15 and 16.

The Court: They are received in evidence.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits Nos. 14, 15 and 16.)

[See pages 169-172.]

Now, what about No. 1?

Mr. Sturr: We do object to No. 1 on the ground it is nothing more than a letter from E. F. Grandy, Inc., to V. L. Murphy acknowledging receipt of a letter and——

The Court: This is offered to show, I take it, notice or a recognition and I don't know definitely about this, so I will reserve ruling on No. 1 until we have argument.

Mr. Green: We offer Exhibits 12 and 13.

Mr. McCall: We have no objection to either of those.

The Court: They may be received in evidence.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits Nos. 12 and 13 respectively.)

[See pages 166-169.]

Mr. Green: I would like to ask the Court to inquire of the defendant whether they have any evidence to offer, or whether they have rested.

The Court: They have told the Court they rest. If they want to reopen I will let them.

Do you want to rest or do you want to reopen?

Mr. McCall: Your Honor, I believe that exhibits we presented to the Court have been introduced and received.

The plaintiffs put in the contract and the bonds, which is our main defense, and subject to the brief we will write with the Court's permission we rest.

The Court: That brings us to the time of argument.

Are you prepared for oral argument today?

Mr. McCall: I was willing to waive oral argument if we filed briefs.

The Court: Do you mind relieving me somewhat of judicial suspense?

Tell me the defense to this action and write the brief and back it up.

I would like to know what you are driving at and why you don't want to pay this money.

Mr. McCall: The bond specifically says that it is an indemnity bond to wholly indemnify Mr. Grandy in the event he suffered a loss which he has not suffered.

The Miller Act which was the Hurd Act up until 1935, as your Honor knows, gives a specific remedy to furnishers of labor and material, and spells it out so no one can be mistaken.

If that is the act that they are filing under here they [85] are long, long too late.

If they have waived their rights under that act they still have no right to come back again on a bond which provides on its face that it is an indemnity bond.

We have case in California holding that in the case of that kind there is no liability on the part of the surety until the man in the place of Grandy has actually paid out the money and then he is to be reimbursed.

That will be covered, I think, better in our briefs than we can in argument.

The Court: That begins to orient the Court to what your position is.

I have been wondering here why, when what ap-

peared to the Court to be a conventional plaintiff's case was before the Court without any challenge on its being so.

Now you have presented a question and I will have to search that bond to see if it is as restricted as you claim and whether the facts here are such as to support a recovery under it.

Do you see what his point is, Mr. Green?

Do you want to comment on it?

We are going to have briefs, but how are you going to get over that hurdle?

He says the bond comes into operation only when your client has suffered loss, by having paid out the money. [86]

Mr. Green: I would like to know if those are the two points they are relying on. Is that so, Mr. McCall? Because as soon as they are answered he will have another point and I would like to know just what I am required to answer.

If those are the two points you are relying on I could answer in a moment.

Mr. McCall: I did not think the defendants were limited to two points in a lawsuit.

The Court: You can raise as many points as you want. That is the law and I am glad it is the law because it is my personal disposition to hear everything.

In the interest of orderliness I like to hear everything you are going to urge extenso in your briefs just so long as we have it in capsule form here, so we know what you are driving at.

Do you have any other specific defense in mind?

Mr. McCall: Of course, until we have prepared our brief, just on the spur of the moment there might be some defenses I wouldn't have in mind, but that is the main sense I just called out to the Court.

Maybe Mr. Sturr has something he would like to say.

He has carried the laboring oar while I have been out of the city.

The Court: He is a very capable young man. We are glad to have him here. If you have seen anything wrong with the [87] plaintiff's case that Mr. McCall has not pointed out, will you point it out?

Mr. Sturr: Yes, if the Court please, just the fact that we can find no indication, even with all the exhibits, by the greatest stretch of the imagination we find no contract between E. F. Grandy and American Seating Company whereby E. F. Grandy promised to purchase these materials and pay for these materials.

Furthermore, we do contend that since there are two bonds, the payment bond and the performance bond, that there is no doctrine of law that says merely because you have a bond anybody can recover on it.

We do claim that the plaintiff and defendant cannot recover on the bond because there were two bonds basically and the performance bond was not intended to cover any loss by reason of failure to pay for material and labor.

The Court: When you write your brief do so in a manner as if you were writing it for a teacher

on the subject when you were back in school and assume it is a teacher who is not too bright.

I am not confessing to that condition, but I like you to——

Mr. Sturr: I would assume also the student is not too capable.

The Court: I like to have it framed so that we can get [88] it easily.

Mr. Green: Are you through with the stating of your defenses, Mr. Sturr?

Mr. Sturr: Yes.

Mr. Green: May I ask this question? I asked you once before and maybe I can get an answer:

Do you claim the Miller Act is the exclusive remedy?

Mr. Sturr: I am making no claim the Miller Act is the only way a subcontractor can recover. I am making no claims.

Mr. Green: Counsel made a statement the only way a man could recover was under the Miller Act. You know the Miller Act is merely an additional remedy given to the subcontractor and it is not an exclusive remedy, isn't that true? Isn't that what your research shows?

Mr. Sturr: I don't claim that my research shows that.

Mr. Green: Do you claim the Miller Act is an exclusive remedy?

Mr. Sturr: I don't claim anything.

Mr. Green: I would like to be heard then this afternoon.

The Court: Go ahead.

Mr. Green: This has been pending for over a year.

Counsel says it came up by surprise. We have had demands for admissions and interrogatories served and we have had conferences and conferences and it was set for trial and the Court ordered at the pretrial that briefs, if any, be submitted [89] within 20 days after receipt of the transcript and they tell us this all came up by surprise.

The Court: Let's get to your answer to their defense.

You have made out, in the Court's mind, a case, unless we have overlooked something which they tell us, namely, that the Miller Act is exclusive and that you are out under the Miller Act, that you are too late.

Mr. Green: We are not suing under the Miller Act and counsel does not have the temerity to tell the Court that.

The Miller Act is one additional remedy given under certain circumstances.

The Court: I understand Mr. Sturr did not go that far, but Mr. McCall did.

What are you suing under?

Mr. Green: We are suing under a common law bond that was furnished by the subcontractor to Grandy in two bonds, one a payment bond and one the completion or performance bond.

Now, they take the unique position and the authorities they have cited in their brief on file here states you cannot recover under a performance bond if there is a payment bond because the theory is

that the payment bond is intended to protect the material men.

Then they cite another case that says that if you have a payment bond you cannot recover on the payment bond until the contractor to whom the bond was given is already paid. [90]

This is an action aganst Grandy as well as the bonding company.

We can simplify this matter very easily: Give us our judgment against Grandy. Once that is done they admit that then the payment bond comes in and they have to pay.

We are not, as I heard this Court make a comment earlier today, we are not back in the Sixteenth Century in our new Federal procedure. The purpose is to have all these matters adjudicated at one time if possible.

Certainly he does not claim under our enlightened procedure it is necessary for us to get a judgment against Grandy and Grandy has to go and sue them on the bond to recover.

The Court: I understood him to say that was so.

Mr. Green: He has cited a case as authority for that proposition.

The Court: As I understood it, on the general theory of the law, or suretyship in law school, and one of the Supreme Court Justices of the State of California today was one of my teachers in law school, teaching suretyship, you must not only get a judgment but you had to have a return that was uncollectible.

Mr. Green: That is not the law.

The Court: That was the law 30 years ago.

Mr. Green: The cases in California—and it is California law we are concerned with—early decided that and I [91] refer specifically to Pacific States Company vs. United States Fidelity and Guaranty Company.

I don't know whether the Court has read that case. We have these briefs on file with the Court and maybe the Court has read them.

The Court: I have read the exhibits but have deferred reading the briefs until I have heard the argument.

When I say what I understand the law to be I am speaking of a loose understanding based upon memory or cases I had in private practice or cases in law school, because I have not had this exact question arise in my practice for over 15 years and you can get very rusty on a question of suretyship in 15 years.

Mr. Green: In that case, the Pacific States vs. United States Fidelity and Guaranty Company case there was a claim of a material man against the surety bond which was given to pledge the faithful performance of a subcontract for the construction of specific parts of a building.

This is the performance bond that we are talking about now. And there they had almost the identical language of this performance bond.

In that case the Court of Appeals of California held a bond given for the faithful performance of a contract binds the surety for labor performed and materials furnished thereunder as completely as

though the surety were the party to the [92] contract.

That is exactly this situation.

They held in that case the performance bond required that the surety pay the material man of this subcontract—and we cited that case in our brief.

Counsel has not answered that they attempted to distinguish or argued in any way.

The Court: That case further said that a bond which undertakes a guarantee of faithful performance of a subcontract to furnish all necessary labor and material for a specified portion of a structure implies a promise to pay for such labor and materials furnished.

Furthermore, the Court said that the bond is not a pledge for the sole benefit of the general contractor but inures to the benefit of any person who performs labor or furnishes materials which are used in the structure pursuant to the provisions of the subcontract.

Much later, the California courts in the case of Christie vs. Commercial Casualty Insurance Company, 6 Cal. App. 2nd 711, held that an employee of a subcontractor could recover against the surety on its bond given in connection with the building of a public roadway for work performed by him in connection with said contract.

The court said:

"A common law or statutory bond to secure the [93] attainment of labor performed on public work pursuant to a contract should receive a liberal con-

struction so as to fulfill the evident purpose of bond."

The Court further said:

"In accordance with the California cases and ordinary statutory or common law bond to secure the payment of claims for materials furnished or labor performed should receive a more liberal construction of the language to carry out the evident intention of the parties to the instrument."

There are many other cases cited in the brief to the same effect and I want to call the Court's attention——

The Court: I am going to read everything cited in the brief.

Mr. Green: The only purpose I have in making this argument now is that these things have not been challenged by the defendant.

What I have stated is the law and I don't think the Court needs to be burdened unless counsel can challenge this.

The Court: Maybe they are going to challenge them.

Suppose we fix times for the briefs.

Mr. Green: We have in this Pacific States case another phase of it and I want to call that to the Court's attention.

This was exactly a similar situation where the principal [94] contractor had filed a statutory bond with the State in doing the job and then the subcontractor filed a payment and performance bond.

This is what the court said:

"The obligation of the respondent,"—referring

to the bonding company on the subcontractor's bond —"in the present cases to guarantee payment for labor performed and materials furnished under the subcontract seems fixed and certain. The fact that these claimants may have been entitled to recover compensation from the original general surety, Metropolitan Casualty Insurance Company,"—and this was the surety under the statutory bond furnished by the contractor to the owner—"does not release the respondent from the clear obligations of its contract."

The cases cited by counsel in their brief include the case of Albert vs. American Casualty Company, which has nothing to do with this case, and the case of Ramey vs. Hopkins, which is a case in which the court held that there is no distinction between an indemnity agreement providing for indemnity against loss and damage, and one against failure for completing the building fully contracted for.

They said in that case they should go after one of the bonds rather than the other bond, but here we have bonds and [95] in that case they held, and this is the language:

The suit was brought against both the contractor and the surety and judgment was recovered against both. The court which reversed it as against the surety sustained the judgment against the contractor on the theory that the liability of the contractor was clearly established.

In other words, they reversed it as to the surety on their theory of the case but they held the judg-

ment against the contractor so that the contractor could collect from the surety.

In this case, your Honor, again we can sever this situation as we did where the bank was concerned.

We can sever this by judgment at this time against Grandy.

There is no question that Grandy is the man who sent these purchase orders on to American Seating Company, who knew that American Seating Company furnished this material—and didn't pay them.

Certainly, there is at least an implied contract on their part to pay for anything as was seen in the Ramey case that they cite.

The contractor is liable without any question.

So it doesn't make any difference if you at this time give us judgment against Grandy and then we may never have to act on the bonds because I am sure that the bonding company [96] will pay but Grandy has to pay and we will be all through.

These defendants in this case have thrown in nothing but smoke screens. I don't wonder that the Court wonders what their defense is.

Up to this point their defense is included in the memorandum brief filed with this court and now they say 38 days from the pretrial they still haven't come up with a single case to call to the Court's attention.

Mr. McCall makes the statement to this Court that the Miller Act is exclusive or gives the exclusive remedy or tries to give the Court that impression.

Then his associate, who apparently did the law work will not say that is an exclusive remedy.

I want to call the Court's attention to the language of that Miller Act and the decisions which make it an additional remedy:

"Whenever there is a relationship that any person having direct control relations with the subcontractor, but no control relationship, express or implied, with the contractor, furnishing said payment bond, shall have a right of action on said payment bond."

In this case we have a situation where the subcontractor's material men, the American Seating Company had an implied contract with the E. F. Grandy and Company. [97]

That is what all these exhibits show. They show that the purchase order went right through Grandy's hands to the Navy and back to American Seating, that they were the ones who had all the relationships with American Seating Company. They were the ones who set up the specifications and they were the ones who also encouraged the subcontractor to dissipate his funds by assigning them to someone else when they know, or certainly in the exercise of any business judgment should have known that he would need these funds to pay his material men.

Instead of that they say, "Go ahead and assign them to someone else."

The record here shows the payments made before this job was even completed to the bank for Murphy, without giving any consideration or any thought to seeing that American Seating Company got paid.

This is not a Miller Act case and no action was brought under the Miller Act.

Under the Miller Act we could have brought an action in a certain period of time against the United States Government, against Grandy's original bonding company and got our money.

We didn't do that because we were misled by Murphy who said he didn't get his money from the Government and couldn't pay.

So no action was taken under the Miller Act and we are suing on these indemnity bonds that were furnished by Glens [98] Falls.

But let's forget that.

We are suing for the reasonable value of the merchandise furnished to Grandy.

He took the merchandise and put it in his shop and got paid for the job.

If, instead of the Government it was your house or my house then of course a lien could have been filed against that house.

Against the Government you cannot file a lien.

So, when we make the claim you see what happens. They come up over a year after the lawsuit, let alone almost two and a half years after they had noticed this claim——

The Court: They say you first have to go to Grandy and then if he doesn't pay you go to them.

Mr. Green: We are going to Grandy.

This is an action against Grandy.

Give us a judgment against Grandy. We will be satisfied.

The Court: Are you abandoning your plea for judgment against Glens Falls?

Mr. *Miller*: We are not abandoning our plea for judgment against Glens Falls.

We are absolutely entitled under the California law and these other laws to judgment against Glens Falls, but we are willing to separate our claim against the Glens Falls at this [99] time and give us judgment against Grandy and if we collect that we don't have to litigate against anybody else.

The Court: I understood the defendant wanted to file briefs and he is content on the argument made.

If you want to argue it further, Mr. Sturr or Mr. McCall, either or both of you may.

If you want to file briefs instead of argument, ask for any reasonable time bearing in mind the Court wants to get this case off the books during the month of May.

Mr. McCall: I presume from what has been said here that counsel for plaintiff does not care to file the first brief as I understand his right would be.

Therefore, we would like to have, if the Court please, and counsel, 20 days within which to file a brief.

Mr. Green: They were given 20 days once before and did not take advantage of it.

Mr. McCall: I am not sure we need that much time but I do have some other commitments.

The Court: The Court will ask for concurrent briefs, that is, plaintiff and defendant. Of course,

we have a plaintiff's brief which appears, on just cursory examination, to be very full.

Mr. Green: We are willing to rest on our brief.

The Court: If you want to consider that your concurrent brief you may. [100]

I will give both sides time to file a brief, but it is not required because the principles in this case are rather simple and if no one files any briefs and my law clerk and I can go into the library, we can work it off in a couple of hours. If you can save us that couple of hours with briefs that are complete enough with quotations, you may be sure I will read all of them.

Mr. McCall: The Court's remarks on suretyship remind me of a man who was asked if he studied Latin in school and he said, "Yes, but if you are going to question me on it, proceed as if I never had."

We already have briefs but——

The Court: I will give you until May 20 to get in whatever further briefs you desire, but if you act on that please make them full briefs in the sense of pointing out your contentions and quote any flinching language from any authority you have.

Those briefs will be due by the close of business of May 20th.

Do you want the opportunity to answer anything?

Mr. Green: I don't know what counsel can give us that will require any answer.

If any answer is required we will ask for permission at that time.

Mr. Sturr: The question was if you want a chance to answer? [101]

Mr. Green: Sir?

Mr. Sturr: The question was if you wanted a chance or an opportunity to answer.

The Court: You have been clamoring for early disposition of the case and I am trying to give it to you.

I had in mind if you get your briefs in on the 20th, the law is pretty well settled on these things, and if someone is off base and is urging a point which is utterly fallacious so far as the law is concerned, of course, they might want to place an interpretation or the facts which could be, of course.

The briefs will be due by June 20 and any party may put in an answering brief by the 25th.

Mr. McCall: That is very, very fair.

The Court: On May 25 at 5:00 o'clock the matter will stand submitted.

[Endorsed]: Filed February 25, 1954.

PLAINTIFF'S EXHIBIT No. 1

V. L. Murphy, May 12, 1949
1117 Obispo Ave., Long Beach, Calif.

Dear Mr. Murphy:

Your letter of May 11th, requesting payment clause, received and noted. We have inserted in your white copy of the contract, returned herewith, a clarification of our payment method on Federal or

Public work, which has in the past been both fair and satisfactory to all parties concerned.

You will, no doubt, understand our position relative to demand payments by our sub-contractors on or before the 10th of the month, since the operation of these jobs, as you are well aware, requires a rather substantial investment.

I might recommend, should additional operating capital be required, that this sub-contract may be assigned to the Bank with whom you are regularly depositing.

Hoping that this will be satisfactory, we remain,

Yours very truly,

E. F. GRANDY, INC.

efg:h—encl.

By .....

Marked for Identification April 1, 1953.

PLAINTIFF'S EXHIBIT No. 2

[Letterhead of E. F. Granby, Inc.]

SUB-CONTRACT

4 May, 1949

Project No. NOy-16752, Spec. 20656, Conversion of Bldg. IS-16, U. S. Naval Ammunition & Net Depot, Seal Beach, Calif.

To: E. F. Grandy, Inc., Gen. Cont.
Laguna Beach, Calif.

The undersigned as Subcontractor hereby undertakes and agrees to perform and complete that por-

tion, hereinafter specified, of the work to be performed and completed under and by virtue of that certain authorization dated the 29th day of April, 1949, between yourself as Contractor and Officer-in-Charge of Construction, U. S. Naval Base, Los Angeles, for the United States Government, as Owner and the plans, specifications and conditions described or referred to therein; said work to be performed and completed subject to said contract, plans, specifications, and conditions which are and each of them is hereby made a part hereof by reference as though set at length.

Subcontractor agrees to furnish all materials, labor, tools, machinery, equipment, light, power, water or other things necessary to perform and complete the following portion of the work:

Plumbing and Piping; per Section 17, Spec. 20656, Y & D Drawings, No. 417042 thru 417055.

Progress payments will be made in the following manner. Sub-contractor shall submit to the Contractor, before the 1st of each month, subsequent to that month in which materials or services have been furnished or performed, invoices for such material or service. These invoiced amounts will be incorporated into progress estimates submitted, to the Officer-in-Charge of Construction for approval and authorization of payment, on or about the 1st of each month during the life of the contract. Upon Contractor's receipt of payment (normally in about 20 days, for 90% of the amount approved), the Contractor will issue payment in the amount approved, less 10%.

The work to be done hereunder shall be commenced at the time and place to be designated by Contractor and shall be performed without interference with or hindrance of any of the other work being performed under said contract and subject to the schedule and progress thereof and shall be completed on or before the 1st day of September, 1949, subject to such extension of time as Contractor shall deem justifiable for delays caused by acts or neglect of Contractor or Owner from any liability for damage, loss, or injury to Subcontractor resulting from delay.

The total price to be paid to Subcontractor shall be Sixteen Thousand Six Hundred Sixty-Seven and 05/100 Dollars ($16,667.05) lawful money of the United States, no part of which shall be due until five (5) days after Owner shall have paid Contractor therefore, provided however that not more than ninety (90) per cent thereof shall be due until thirty-five (35) days after the entire work to be performed and completed under said Contract shall have been completed to the satisfaction of Owner, and provided further that Contractor may retain sufficient moneys to fully pay and discharge any and all liens, stop-notices, attachments, garnishments and executions. Nothing herein is to be construed as preventing Contractor from paying to Subcontractor all or any part of said price at any time hereafter as an advance or otherwise.

Subcontractor shall indemnify and save harmless Contractor and Owner from any and all loss, damage, liability or injury resulting from, arising out

of, or in connection with said work or any part thereof and shall furnish to Contractor at Subcontractor's expense valid Public Liability, Property Damage insurance in amounts and written by companies satisfactory to Contractor and shall carry and maintain Workmen's Compensation insurance in amounts and written by companies satisfactory to Contractor.

The Subcontractor agrees to indemnify and save harmless the Contractor and the Owner of said buildings against all damages which they or either of them may sustain by reason of anything to be supplied hereunder being covered by a patent not owned by the Subcontractor, or by reason of the use by the Subcontractor of any art, machine, manufacture or composition of matter on said work in violation of any patent or patent rights or infringement thereof, and at the expense of the Subcontractor to defend any action brought against the Contractor or the Owner, founded upon the claim that any such thing, or any part thereof, infringes any such patent.

Unless specifically waived by endorsement hereon Subcontractor shall furnish at Subcontractor's expense a performance or completion bond in any amount and with sureties satisfactory to Contractor.

Subcontractor shall be liable for and indemnify Contractor and Owner for all loss, damage, liability or injury resulting from, arising out of, or in connection with any delay in the performance or com-

pletion of the work to be done hereunder or any breach hereof.

During the progress of the work and until the date of completion and acceptance of the building the Subcontractor shall in every respect be responsible for and shall make good all loss, injury, or damages to the building, and shall maintain insurance, (including earthquake insurance) covering all work incorporated in the building and all materials for the same in or about the premises, the policies to be made payable to the Contractor and the Subcontractor as their interests may appear.

Subcontractor shall, if so requested by Contractor, perform and complete any extra work or changes hereunder and no charges therefor shall be due or payable except upon agreement in writing made prior to the commencement of said extra work or changes.

Contractor or Owner may personally or by agents inspect, direct or supervise all work to be done hereunder.

The Subcontractor agrees that in the preparation of his material and the erection of his work on the building he will employ only such men as will work in harmony with the other men employed by the Contractor.

Upon the breach of this subcontract in whole or in part or upon any assignment thereof voluntary or by operation of law or upon commission of any act of bankruptcy by Subcontractor or upon the death of Subcontractor or upon Subcontractor's failure or refusal to do any of the work to be done

hereunder to the satisfaction of Contractor, Contractor may at his option personally, by agents, or other subcontractors perform and complete said work for the account and at the expense of Subcontractor and withhold from the price to be paid hereunder sufficient funds therefor.

All moneys due and payable hereunder shall be payable at the office of the Contractor in the City of Laguna Beach, California, and if Subcontractor is more than one individual, payment to any one thereof shall be payment to all.

This contract may not be assigned nor the work to be done thereunder subcontracted in whole or in part without the written consent of Contractor first had and obtained.

Subcontractor shall not place, permit to be placed, nor maintain any signs or other advertisements in, on, about, nor in the vicinity of said work, without written permission from the Contractor.

Yours very truly,

/s/ By V. L. MURPHY,
1117 Obispo Ave., Long Beach, Cal.

Accepted this 4th day of May, 1949.

E. F. GRANDY, INC., GEN. CONT.
/s/ By E. F. GRANDY

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 3

[Letterhead of Glens Falls Indemnity Co.]

No. 427357

PERFORMANCE BOND

Know All Men By These Presents, That we, V. L. Murphy, doing business as V. L. Murphy Plumbing Co., as Principal, and Glens Falls Indemnity Company, a New York Corporation, as Surety, are held and firmly bound unto E. F. Grandy, Inc., hereinafter called the obligee, in the penal sum of Sixteen Thousand Six Hundred Sixty-seven and 05/100 ($16,667.05) Dollars for the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas the Obligee entered into a certain contract, with the Government, dated April 29, 1949, for conversion of Bldg. IS-16, U. S. Naval Ammunition & Net Depot, Seal Beach, California, NO6-16752, Specification 20656 and,

Whereas, said Principal entered into a written subcontract on the 4th day of May, 1949, with E. F. Grandy, Inc. for Plumbing and Piping; per Section 17, Specification 20656, Y & D Drawings No. 417042 thru 417055.

Now, Therefore, If the principal shall well and truly perform and fulfill all the undertakings, covenants, terms, conditions, and agreements of said contract during the original term of said contract and any extensions thereof that may be granted by

the Government, with or without notice to the Surety, and during the life of any guaranty required under the contract, and shall also well and truly perform and fulfill all the undertakings, covenants, terms, conditions and agreements of any and all duly authorized modifications of said contract that may hereafter be made, notice of which modifications to the surety being hereby waived, then, this obligation to be void; otherwise to remain in full force and virtue.

In Witness Whereof, the above-bounden parties have executed this instrument under their several seals this 18th day of May, 1949, the name and corporate seal of each corporate party being hereto affixed and these presents duly signed by its undersigned representative, pursuant to authority of its governing body.

V. L. MURPHY PLUMBING CO.,
/s/ By V. L. MURPHY, Principal

GLENS FALLS INDEMNITY COMPANY,
/s/ By LEO G. LEVENS, Attorney

Premium for this bond is $166.67 for the period thereof.

Duly Verified.

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 4

[Letterhead of Glens Falls Indemnity Co.]

Bond No. 427357

PAYMENT BOND

Know All Men By These Presents, That we, V. L. Murphy, doing business as V. L. Murphy Plumbing Co. as Principal, and Glens Falls Indemnity Company, a New York Corporation, of Glens Falls, New York, as Surety, are held and firmly bound unto E. F. Grandy, Inc., hereinafter called the Obligee, in the penal sum of Eight Thousand Three Hundred Thirty Three and 58/100ths ($8,333.58) Dollars for the payment of which sum well and truly be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

The Condition of This Obligation Is Such, that whereas the said Obligee entered into a certain contract with the Officer-in-Charge of Construction, U. S. Naval Base, Los Angeles, for the United States Government, dated April 29, 1949 for Conversion of Bldg. IS-16 U. S. Naval Ammunition & Net Depot, Seal Beach, Calif., NO6-16752, Specification 20656

Whereas, said Principal on the 4th day of May, 1949 entered into a written subcontract agreement with E. F. Grandy, Inc. for Plumbing and Piping; per Section 17, Specification 20656, Y & D Drawings No. 417042 thru 417055

Now Therefore, If the Above Principal shall indemnify and hold the said Obligee free and harm-

less from and against all loss and damage by reason of its failure to promptly pay to all persons supplying labor and materials used in the prosecution of the work provided for in said subcontract, then this obligation to be null and void, otherwise to remain in full force and effect.

Signed and Sealed this 18th day of May, 1949.

V. L. MURPHY PLUMBING CO.,
/s/ By V. L. MURPHY, Principal

GLENS FALLS INDEMNITY COMPANY,
/s/ By LEO G. LEVENS, Attorney

Refer to Performance Bond for charge for both bonds.

Duly Verified.

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 5

[Letterhead of American Seating Company]

QUOTATION

August 22, 1949

To all Contractors: Re: Quality Control Surveillance Laboratory, U. S. Naval Ammunition & Net Depot, Seal Beach, California.

We are pleased to submit herewith our revised quotation on Kewaunee Laboratory Furniture for above project as follows:

Item No. 1—One Center Table approximately 21′0 long, to consist of an enclosed end sink No. S-691-X (12″ deep). The table is to have a 1¼″ thick soapstone top and center trough. There are to be 4 No. S-271 units, 2 No. S-173, 2 No. S-420, 2 No. S-233, and 2 No. S-100. These file units are to be at the extreme end opposite the sink, and are to be next to the S-420 units, which will be 30″ high, forming a desk on either side of the table. The plumbing is to be provided at the sink-end. There shall be a Reagent Rack similar to that shown on Steel Lab Table No. 4450, to have 4 No. S-944 water cocks, 16 No. S-901A gas cocks, 8 No. S-1101A double electric flush receptacles, and 1 No. S-927 hot and cold water goosenecks, with piping in the Reagent Rack only. Sink is to be of soapstone also—$3392.00.

Item No. 2—Two No. S-1817X Units (72″ long). One of them to have 1 No. S-1215-C electric heated water bath, left end of left hood; and these units are to have 1 each of the following: 1 No. S-740 soapstone sink, right end of both hoods; 1 No. S-1106-F quadruple electric, in center rear; 1 No. S-924 remote control water; 1 No. S-904-A remote control gas; 1 No. S-904-A remote control vacuum, with vapor-proof light and switch—$2482.00.

Item No. 3—One No. 60AS Sink with 1 No. W-1446 Birch Pegboard—$482.00.

Total—$6356.00.

The above items will be of standard Kewaunee construction, with standard finish black plastic hardware and chrome-plated fixtures. Piping and

conduit is included in the Reagent Rack of Item No. 1 only. The above prices include delivery and assembly of equipment, but no piping or conduit (except as above mentioned), nor does it include our setting of the fixtures. The above quotation is subject to applicable State or Local taxes, if any. Shipment can be made in approximately 90 days after approval of drawings by customer.

We appreciate the opportunity of submitting this quotation, and trust we may have the pleasure of serving you further.

Yours very truly,

AMERICAN SEATING COMPANY,
Los Angeles Branch
/s/ T. E. DEWEY, Sales Manager

TED:b

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 6

[Letterhead of American Seating Co.]

(Copy) August 23, 1949

V. L. Murphy, Plumbing Contractor
1117 Obispo Avenue, Long Beach, California

Re: Quality Control Surveillance Laboratory
U.S. Naval Ammunition & Net Depot, Seal Beach, California.

Dear Mr. Murphy:

We are enclosing a copy of our revised quotation on equipment for the above-mentioned laboratory.

I am writing this letter as a matter of record, and sending a copy to Mr. Grandy at Laguna, so that he will be acquainted with what has transpired verbally for the last two months.

As you will recall, the original shop drawings of this equipment were rejected by the men in charge of this laboratory as not meeting their requirements. Upon checking both with Mr. Johnson and Mr. Bell at the laboratory, and with Mr. Dudley and Mr. Hall at the Naval Shipyards, we found that the specifications, as written on the plans, were not sufficiently detailed, and did not represent the desired equipment. We revised our drawings to meet the approval of the men in the laboratory. This revision resulted in an increase in cost of this equipment to you of approximately $410.00, which new price is still, I believe, within your budget on this job. It is my understanding that the funds set aside for this building have been entirely budgeted, and there is no remaining cash with which to defray this added expense. If an application is made to the Navy by you for any increase, a change-order would be necessary, and the only thing this change-order could bring about would be the deletion from the contract of the entire laboratory equipment. The funds for this equipment would then be returned to the Bureau of Yards and Docks, and it would, presumably, be some years before this equipment could be purchased. I do not think that you desire such a situation. In way of a return for your fairness in this matter, the contracting agency for the Navy has

agreed to grant us (Kewaunee Manufacturing, American Seating, Murphy and Grandy) a time extension on the contract, since it was a mistake in specifications which caused this delay period. We have been assured by Mr. Dudley and Mr. Williams that this extension of time will be granted when applied for, but at this writing we do not know exactly what extension of time will be necessary. In the middle of September we should be able to know exactly how many days will be necessary for the completion of our part of this contract.

I am also sending you four copies of Kewaunee's latest shop drawings, which drawings have already actually been approved by the Department of Public Works at the Naval Base. However, at the time such approval was secured we had in our possession only two copies of the prints, and "for submission through channels" it is our understanding that six sets are necessary. Hence, our sending these four sets at this date. I presume you will send them on to Mr. Grandy so that he may write a letter of submission accompanying these plans, and send them on to the Navy for their ultimate approval (one approved copy of which we should like to receive).

I hope that this letter has in some way clarified the many questions and explanations that have been made to so many people so many different times, in an effort to happily fulfill the contract. Thank you for your patience, and I trust that the equipment will be produced, delivered and installed without further interruptions. I will contact you in

September, giving you our definite date of delivery on this equipment.

Sincerely yours,

AMERICAN SEATING COMPANY,
Los Angeles Branch
/s/ JOHN D. MULLEN,
Sales Representative

vrl—Encls. Copy to E. F. Grandy, Inc., General Contractors, P.O. Box 401, Laguna Beach, Cal.

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 7

[Letterhead of V. L. Murphy]

PURCHASE ORDER

American Seating Company Sept. 23, 1949
6900 Avalon Blvd., Los Angeles 3, Calif.

To be delivered to: Quality Control Surveillance Laboratory, U. S. Naval Ammunition & Net Depot, Seal Beach, Calif.

Item No. 1—One Center Table approximately 21'0" long, to consist of an enclosed end sink No. S-691-X (12" deep). The table is to have a 1¼" thick soapstone top and center trough. There are to be 4 No. S-271 units, 2 No. S-173, 2 No. S-420, 2 No. S-233, and 2 No. S-100. These file units are to be at the extreme end opposite the sink, and are to be next to the S-420 units, which will be 30" high, forming a desk on either side of the table. The plumbing is to be provided at the sink end. There

shall be a Reagent Rack similar to that shown on Steel Lab Table No. 4450, to have 4 No. S-944 water cocks, 16 No. S-901A gas cocks, 8 No. S-1101A double electric flush receptacles, and 1 No. S-927 hot and cold water goosenecks, with piping in the Reagent Rack only. Sink is to be of soapstone also.—$3392.00.

Item No. 2—Two No. S-1817X Units (72" long). One of them to have 1 No. S-1215-C electric heated water bath, left end of left hood; and these units are to have 1 each of the following: 1 No. S-740 soapstone sink, right end of both hoods; 1 No. S-1106-F quadruple electric, in center rear; 1 No. S-924 remote control water; 1 No. S-904-A remote control gas; 1 No. S-904-A remote control vacuum, with vapor-proof light and switch—$2482.00.

Item No. 3—One No. 60AS Sink with 1 No. W-1446 Birch Pegboard—$482.00.

The above items will be of standard Kewaunee construction, with standard finish black plastic hardware and chrome-plated fixtures. Piping and conduit is included in the Reagent Rack of Item No. 1 only. The above prices include delivery and assembly of equipment, but no piping or conduit (except as above mentioned), nor does it include our setting of the fixtures. The above quotation is subject to applicable State or Local taxes, if any. Shipment can be made in approximately 90 days after approval of drawings by customer.

V. L. MURPHY PLUMBING,
/s/ V. L. MURPHY

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 8

efg:h September 26, 1949

To: Officer-in-Charge of Construction, U. S. Naval Base, Los Angeles, U. S. Naval Receiving Station, Long Beach 2, California.

Subject: Contract NOy-16752, Specification No. 20656, Conversion of Building Is-16 to Quality Control Surveillance Laboratory at the U. S. Naval Ammunition and Net Depot, Seal Beach, California.

1. Enclosed herewith four (4) copies Purchase Order from V. L. Murphy, plumbing sub-contractor, to American Seating Company, agents for Kewaunee Manufacturing Company for chemical laboratory equipment presently being manufactured at Adrian, Michigan.

2. It is requested that the Officer-in-Charge of Construction do everything possible to expedite factory inspection in order that, immediately upon completion, this equipment may be forwarded for installation.

E. F. GRANDY, INC.

encl. By .....

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 9

[Letterhead of American Seating Company]

Mr. E. F. Grandy December 20, 1949
P.O. Box 401, Laguna Beach, California

Re: Laboratory Furniture, Quality Control Surveillance Laboratory, U. S. Naval Ammunition & Net Depot, Seal Beach, California.

Dear Sir:

The delivery and installation of laboratory equipment for the above reference laboratory, has been completed except for three items to be corrected.

These three items are the correction of the steam bath to agree with the features detailed on the approved drawing, correct size sink, and replacement of two cracked safety-glass in the fume hood.

The necessary materials are being obtained and the corrections will be made at the Laboratory without additional charge to the contractor or to the U. S. Government. On all three items there are temporary materials in place which will allow the use of this equipment.

Very truly yours,

AMERICAN SEATING COMPANY,
Los Angeles Branch
/s/ E. D. THOMPSON, Office Manager

vrl

Marked for identification April 1, 1953.

PLAINTIFF'S EXHIBIT No. 10

efg:h December 22, 1949

To: Officer-in-Charge of Construction, U. S. Naval Base Los Angeles, U. S. Naval Receiving Station, Long Beach 2, California.

Attention: Mr. E. L. Williams, Contract Superintendent.

Subject: Contract NOy-16752, Spec. 20656, Conversion of Building IS-16 to Quality Control Surveillance Laboratory at the U. S. Naval Ammunition & Net Depot, Seal Beach, California. Laboratory Furniture.

1. Enclosed herewith three copies correspondence received from American Seating Company relative to laboratory furniture manufactured by Kewaunee Company, outlining corrections and/or revisions to be completed in the laboratory installation.

E. F. GRANDY, INC.

encl. By .....

Marked for identification April 1, 1953.

PLAINTIFF'S EXHIBIT No. 11

American Seating Company January 6, 1950
6900 Avalon Blvd., Los Angeles 3, California

Attention: Mr. T. E. Dewey.

Dear Sir:

Enclosed herewith copy of letter received from the Officer-in-Charge of Construction, U. S. Naval

Base Los Angeles, relative to noncompliance with specification requirements.

You are, no doubt, aware that the above mentioned noncompliance constitutes a very effective block to receipt of funds for work already performed on the contract at Seal Beach.

In view of this condition, it is requested that your firm make all possible effort to comply with the required work outlined in the enclosed letter.

Yours very truly,

E. F. GRANDY, INC.

efg:h—encl.

By .....

Marked for identification April 1, 1953.

PLAINTIFF'S EXHIBIT No. 12

Registered—Return Receipt Requested.

December 1, 1950

Glens Falls Indemnity Company
548 South Spring Street
Los Angeles 13, California

Attention: Surety Department.
Re: Payment Bond No. 427357, V. L. Murphy, 1117 Obispo Avenue, Long Beach, Calif.

Gentlemen:

We are writing with reference to a contract entered into between American Seating Company and V. L. Murphy, on which E. F. Grandy, Laguna Beach, California, was the general contractor, for

the United States Navy, Quality Control Surveillance Laboratory, Seal Beach, California.

Mr. Murphy has outstanding with us, under the contract, the sum of $6,124.37, per the attached invoice. This amount is greatly overdue, and Mr. Murphy has given us a number of reasons why payment is delayed—among them that he had not received payment from Mr. Grandy, the general contractor. Upon contacting Mr. Grandy directly we were informed that Mr. Grandy has paid Mr. Murphy in full. Since receiving this information from Mr. Grandy, Mr. Murphy admitted that he had been paid.

Under the circumstances, inasmuch as Mr. Murphy has failed to remit to us the amount due us, we have no alternative but to make formal demand for payment in full under the above Payment Bond No. 427357. Please let us know when we may expect to receive payment in full.

Very truly yours,

AMERICAN SEATING COMPANY,
Los Angeles Branch
vrl GEORGE W. PETERSON, Manager

Copy to: Mr. V. L. Murphy, 1117 Obispo Ave., Long Beach, Cal. B/cc: E. L. Grandy, E. F. Grandy, Inc., P.O. Box 401, Laguna Beach, Calif.; Mrs. Eva L. Cole, Cole Insurance Agency, Inc., 548 So. Spring St., Los Angeles 13, Calif.; Miss Ruth Casalini, San Francisco Office.

P.O. Return Receipts attached.

[American Seating Company Invoice]

No. 58706 OR/CO Date: 3-15-50

Sold to: V. L. Murphy, Plumbing & Heating, Mr. V. L. Murphy, Box 214A, Route 1, Anaheim, California.

Ship to: Quality Control Surveillance Laboratory, U. S. Naval Ammunition and Net Depot, Seal Beach, California.

Date Entered: 6-27-49; Ship when: S.A.P.; Routing: Best way ppd; F.O.B.: Dest set up (not connected); Salesman: Mullen; Cust. No. 179. Terms: Net 30 days from date of invoice.

Quantity Shipped	Amount
1 Only—Fume Hood—Item No. 1	
1 Only—Center Table—Item No. 2	
1 Only—Sink—Item No. 3	
All above delivered and assembled (not including piping or conduit nor setting of fixtures) in Quality Control Surveillance Laboratory, U. S. Naval Ammunition and Net Depot, Seal Beach, Calif., per our quotation dated April 7, 1949, for the total sum of....	$5,945.99
(All applicable taxes to be added)	
3% State Sales Tax.....	178.38
	$6,124.37

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 13

[Letterhead of Glens Falls Indemnity Co.]

American Seating Company, Jan. 3, 1951
6900 Avalon Blvd., Los Angeles 3, California.

Re: Bond No. 427357, V. L. Murphy Plumbing Co., Prin.; E. F. Grandy, Inc. Obligee.

Attention: George W. Peterson, Manager.

Gentlemen:

In response to your letter of December 22nd, 1950, may we advise that Mr. Murphy discussed the matter of his unpaid account with this office and stated at that time that stated claim was not to be considered as a default under the bond but was instead a matter which he would take up with your firm. Under the circumstances, we have no alternative other than to accede to Mr. Murphy's request.

Yours very truly,

CLAIM DEPARTMENT
/s/ By ROY O. SAMSON

ROS:pr

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 14

E. F. Grandy, Inc. May 23, 1949
P.O. Box 401, Laguna Beach, California.

Gentlemen:

This is to advise you that I have given a full and complete assignment of our Sub-Contract dated

May 4, 1949, under Project No. NOy-16752, to the Farmers and Merchants Bank of Long Beach.

You are hereby authorized and instructed to forward the proceeds due me under the above Sub-Contract direct to the Farmers and Merchants Bank of Long Beach, 302 Pine Avenue, Long Beach, California, attention J. B. Ivey, Vice President.

Kindly acknowledge receipt of this assignment direct to the bank.

Very truly yours,

mh /s/ V. L. MURPHY

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 15

[Letterhead of Farmers & Merchants Bank]

E. F. Grandy, Inc. May 23, 1949
P.O. Box 401, Laguna Beach, California.

Gentlemen:

We are enclosing a letter signed by V. L. Murphy authorizing you to forward the proceeds due him under your Sub-Contract dated May 4, 1949, direct to this bank.

Kindly acknowledge receipt of this assignment by signing and returning to us the attached copy of this letter.

Very truly yours,

J. B. IVEY, Vice President

We herewith acknowledge receipt of assignment of V. L. Murphy's Sub-Contract, dated May 4, 1949, for Plumbing and Piping, under our prime Contract NOy-16752 for Conversion of Building IS-16 to Quality Control Surveillance Laboratory at the U. S. Naval Ammunition & Net Depot, Seal Beach, California, subject to such revisions as may be required during construction.

All payments due under above described Sub-Contract will be made direct to the Farmers and Merchants Bank of Long Beach, 302 Pine Avenue, Long Beach, California, attention J. B. Ivey, Vice President.

Dated: 25 May 1949.

E. F. GRANDY, INC.,
/s/ By E. F. GRANDY

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 16

ASSIGNMENT

For Value Received, I, the undersigned, hereby sell, assign and transfer to the Farmers and Merchants Bank of Long Beach, 302 Pine Avenue, Long Beach, California, all my right, title, interest and demand in all monies due or to become due, when and as the said monies shall have accrued pursuant to the terms of Sub-Contract dated May 4, 1949, by and between V. L. Murphy and E. F. Grandy, Inc., covering Plumbing and Piping per

Section 17, Spec. 20656, Y & D Drawings No. 417042 thru 417055, with full authority to collect and receipt for the same.

Dated at Long Beach, California, this 23rd day of May, 1949.

/s/ V. L. MURPHY

Subscribed and sworn to before me this 23rd day of May, 1949.

[Seal] /s/ MARYALYS HELFRICH,
Notary Public in and for County of Los Angeles, State of California.

Admitted in Evidence May 8, 1953.

PLAINTIFF'S EXHIBIT No. 17

[Letterhead of John E. McCall]

Wolfson & Essey January 22, 1953
Attorneys at Law
121 S. Beverly Drive, Beverly Hills, Calif.

Atten: Mr. Irving H. Green.
Re: American Seating Company vs. Glens Falls Indemnity Co., et al.

Gentlemen:

I sent a copy of your letter of December, 1952 to Mr. Grandy and after he had received from you his file, he called and gave me the following information regarding the questions raised in your letter:

The answer to Interrogatory No. 4 contained a typographical error wherein the amount was shown as $61.37 at line 12 and should have been $6,356.

Re Interrogatory No. 7: Any change in this answer by Mr. Grandy would be hearsay.

Re Interrogatory No. 8: The file which you sent back to Mr. Grandy contains a copy of said Purchase Order, so Mr. Grandy's answer to Interrogatory No. 8 should be changed to show that the file you returned to him did have a copy of the Purchase Order in it.

Re Interrogatory No. 10: The date of the payment to the Farmers & Merchants Bank of Long Beach under the assignment by V. L. Murphy was in the file which Mr. Grandy loaned you for use in your suit against Murphy.

Re Interrogatory No. 12: According to the records Mr. Grandy has, the work was completed about June. If the exact date is shown in the records loaned you by Mr. Grandy, we can use the information you have. Work of this kind is never paid for until it is completed or until the material is on the site.

Re Interrogatory No. 20: The original answer is correct; your conclusion is incorrect.

Re Interrogatory No. 24: The original answer is correct.

Interrogatory No. 31: You state this answer is not complete. Mr. Grandy and I know of nothing to be added to the original answer, but if anything is lacking, it is supplied by answer to Interrogatory 32.

I understand you want this additional information to assist you in preparing a proposed Statement of Facts. While I cannot see how anything mentioned in the Interrogatories could become a part of the Statement of Facts, except the amount involved, I shall be glad to review any statement which you may prepare, with the idea of agreeing on a Statement of Facts which may be submitted to the Court with a brief of the legal points.

Yours very truly,

/s/ J. E. McCALL

JEM/gb

Admitted in Evidence May 8, 1953.

DEFENDANTS' EXHIBIT "A"

[Letterhead of American Seating Company]

Glen Falls Indemnity Company Dec. 22, 1950
548 S. Spring St., Los Angeles 13, Calif.

Att.: Surety Department, Mr. Sampson, Claims Dept.

Re: Repayment Bond No. 427357, V. L. Murphy, 1117 Obispo Ave., Long Beach, Calif.

Dear Mr. Sampson:

Miss Blunt of this office, has called your office in reference to the bond that you issued to the above party. Our letter of December 1st explained the conditions involved as to Mr. Murphy not paying his account, and you gave several reasons why you

would not take over the responsibility of either paying or forcing the payment at this time.

We desire very much to have a letter from you giving the reasons that you gave us over the phone. Frankly, we intend to start proceedings very shortly, and bring this matter to a conclusion. We see no reason why you should be reluctant to give us a letter confirming your statements to us, as it is in accordance with the policy of your Company.

Will you kindly let us have this letter the early part of this coming week. In fact we need it by December 27th at the latest. Your attention to this matter will be very much appreciated.

Very truly yours,

AMERICAN SEATING COMPANY,
Los Angeles Branch
vrl /s/ GEORGE W. PETERSON, Manager

Admitted in Evidence May 8, 1953.

DEFENDANTS' EXHIBIT "B"

[Exhibit "B" is a Government Construction Contract which is too lengthy to be printed and for this reason may be referred to in its original form, if required.]

Admitted in Evidence May 8, 1953.

DEFENDANTS' EXHIBIT "C"

[Letterhead of Wolfson & Essey]

John E. McCall, Esq. Dec. 19, 1952
Attorney-at-Law
458 S. Spring St., Los Angeles, Calif.

In re: American Seating Company vs. Glens Falls Indemnity Company, et al.

Dear Mr. McCall:

Pursuant to our telephone conversation concerning this matter today, I am writing to ask you to clarify the answers to the Interrogatories submitted to E. F. Grandy.

The answer to Interrogatory 4 is apparently erroneous. Will you please correct that.

With reference to the answer to Interrogatory 7, we are advised that Grandy was furnished a copy of the purchase order for this material and does know the agreed price at which American Seating Company furnished these materials and supplies on this job. Please have him correct the answer to this Interrogatory.

With reference to Interrogatory 8, the file that we sent back to American Seating Company will show that they did receive a copy of this purchase order. This answer should be corrected. The same applies to Interrogatory 9 and the answer thereto.

In answer to Interrogatory 10, Mr. Grandy did not say the date on which he made payment and this was requested in the Interrogatory.

Grandy knows the answer to Interrogatory 12. We are not concerned with the exact date when

Murphy completed the work but only with the fact that the materials supplied by American Seating Company were installed before Murphy was paid.

I believe that the answer to Interrogatory 20 is incorrect since contractors are required to certify to payment.

The answer to Interrogatory 24 is not complete.

The answer to Interrogatory 31 is not complete.

It is my belief that if the answers to these Interrogatories are corrected properly, it will not be necessary to take the deposition of Mr. Grandy.

Your prompt attention to this matter will be appreciated.

Very truly yours,

WOLFSON & ESSEY,
/s/ By IRVING H. GREEN

IHG-N

Admitted in Evidence May 8, 1953.

[Endorsed]: No. 14258. United States Court of Appeals for the Ninth Circuit. Glens Falls Indemnity Company, a Corporation, and E. F. Grandy, Inc., Appellants, vs. American Seating Company, a Corporation, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed: March 3, 1954.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 14,258

GLENS FALLS INDEMNITY COMPANY, a New York Corporation, and E. F. GRANDY, INC., a California corporation,

Appellants,

vs.

AMERICAN SEATING COMPANY, a New Jersey corporation, Appellee.

POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Pursuant to Rules of the United States Court of Appeals for the Ninth Circuit, Rule 17, Appellants herein make a concise statement of the points on which Appellants intend to rely and designate the record which is material to the consideration of the appeal.

1. Judgment against Appellant Glens Falls Indemnity Company and E. F. Grandy, Inc., or either of them, cannot be predicated upon the common law performance bond.

(A) The performance bond here involved is a common law indemnity bond as distinguished from a bond required by statute, and it was furnished to the obligee, Appellant E. F. Grandy, Inc., contractor, by V. L. Murphy, an independent subcontractor, pursuant to the terms of a subcontract between them and was conditioned upon the perform-

ance of the subcontract by V. L. Murphy. There is no allegation in the complaint, no evidence was introduced and no Finding of Fact was made to the effect that the obligation of said bond was in full force and virtue at the time of the institution of this action. Therefore, Conclusion of Law I, concluding that Appellee is entitled to recover against Appellants, is reversible error because said Conclusion and the Judgment are not supported by the pleadings, the evidence or the Findings insofar as said Conclusion and Judgment may be based upon the performance bond.

(B) The performance bond cannot be the basis for Judgment against Appellant E. F. Grandy, Inc. for the further reason that said E. F. Grandy, Inc. was the obligee thereunder and as such is the person for whose benefit and protection the bond was written and pursuant to which no liability whatsoever was created against or assumed by the obligee, E. F. Grandy, Inc. Conclusion of Law I and the Judgment against Appellant E. F. Grandy, Inc., are erroneous because they are against the law insofar as they may be predicated upon the said bond. There is no evidence and no Finding of Fact and no Conclusion of Law to the effect that said bond conferred, created or gave rise to any liability, claim or cause of action or right of any kind against Appellant E. F. Grandy, Inc., the obligee, and the Judgment is therefore unsupported by the evidence, the Findings of Fact and the Conclusions of Law and the court erred in granting the same insofar as it may be predicated on said bond.

(C) The performance bond is a common law indemnity bond, as distinguished from a bond required by statute, and it was furnished to the obligee, Appellant E. F. Grandy, Inc., contractor, by V. L. Murphy, an independent subcontractor, pursuant to the terms of a subcontract between them for the sole purpose of, and restricted by its terms to, indemnifying the contractor, Appellant E. F. Grandy, Inc., against the failure of the subcontractor to fully perform the subcontract. To predicate judgment upon the performance bond against the surety, Appellant Glens Falls Indemnity Company, the trial court must affirmatively find that the subcontractor failed to perform the subcontract and that Appellant E. F. Grandy, Inc., has been damaged thereby. It was reversible error for the trial court to grant Judgment against Appellant Glens Falls Indemnity Company because there is no evidence to support a Finding that Appellant E. F. Grandy, Inc., was damaged by failure of the subcontractor to perform the subcontract and none was made and Conclusion of Law I is therefore unsupported by the Findings of Fact insofar as said Conclusion of Law is based upon the performance bond.

(D) As a matter of law, a common law indemnity bond such as the performance bond here involved does not confer, create or give rise to any liability, claim or cause of action or right of any kind in favor of third parties and therefore, insofar as Conclusion of Law I and the Judgment for Appellee against Appellants, or either of them, as

surety and obligee, respectively, are based upon any rights supposedly created by the terms and provisions of this bond, the said Conclusion of Law and the Judgment are erroneous because they are against the law.

(E) Finding of Fact 6 that the performance bond was written "in part for the protection of plaintiff to the extent of plaintiff's claim" and "that there existed a contractual relationship relating to said Performance Bond * * * between plaintiff and the defendants * * * and each of them" is wholly unsupported by the evidence and therefore erroneous. The trial court committed reversible error insofar as said Finding may be a Conclusion of Law. because it is unsupported by the Findings of Fact and the evidence and therefore does not support Conclusion of Law I or the Judgment against Appellants, or either of them.

2. Judgment against Appellants Glens Falls Indemnity Company and E. F. Grandy, Inc., or either of them, cannot be predicated upon the common law payment bond.

(A) The payment bond here involved is a common law indemnity bond, as distinguished from a bond required by statute, and it was furnished to the obligee, Appellant E. F. Grandy, Inc. contractor by V. L. Murphy, an independent subcontractor, pursuant to the terms of a subcontract between them and was conditioned to indemnify said Appellant obligee against loss resulting to said Appellant obligee by reason of the relationship of contractor and subcontractor. Appellant E. F.

Grandy, Inc. was the person for whose benefit and protection the bond was written and pursuant to which no liability whatsoever was created against or assumed by the obligee, E. F. Grandy, Inc. Conclusion of Law I and the Judgment against said Appellant are erroneous because they are against the law insofar as they may be predicated upon the said bond. There is no evidence and no Finding of Fact and no Conclusion of Law to the effect that said bond conferred, created or gave rise to any liability, claim or cause of action or right of any kind against Appellant E. F. Grandy, Inc., the obligee, and the Judgment is therefore unsupported by the evidence, the Findings of Fact and the Conclusions of Law and the court erred in granting the same insofar as it may be predicated on said bond.

(B) The payment bond here involved is a common law indemnity bond, as distinguished from a bond required by statute, and it was furnished to the obligee, Appellant E. F. Grandy, Inc., contractor, by V. L. Murphy, an independent subcontractor, pursuant to the terms of a subcontract between them and was conditioned to indemnify said Appellant obligee against loss resulting to said Appellant obligee by reason of the relationship of contractor and subcontractor. To predicate Judgment upon this payment bond against the surety Glens Falls Indemnity Company, the trial court must affirmatively find that Appellant E. F. Grandy, Inc. has suffered such loss. There is no evidence in the record and no Finding of Fact or Conclusion of Law

to the effect that the claim of Appellee against Appellant E. F. Grandy, Inc. arose by reason of the relationship of contractor-subcontractor existing between Appellants and resulted in a loss to Appellant E. F. Grandy, Inc., and Conclusion of Law I is therefore unsupported by the evidence and the Findings of Fact; and the court committed reversible error in granting Judgment against Appellant Glens Falls Indemnity Company.

(C) As a matter of law, a common law indemnity bond such as the payment bond here involved does not confer, create or give rise to any liability, claim or cause of action or right of any kind in favor of third parties and therefore insofar as Conclusion of Law I and the Judgment for Appellee against Appellants, or either of them, as surety and obligee, respectively, are based upon any rights supposedly created by the terms and provisions of this payment bond, the said Conclusion of Law and Judgment are erroneous because they are against the law.

(D) Finding of Fact 6 that the performance bond was written "in part for the protection of plaintiff to the extent of plaintiff's claim" and "that there existed a contractual relationship relating to said * * * Payment Bond between plaintiff and the defendants * * * and each of them" is wholly unsupported by the evidence and therefore erroneous. The trial court committed reversible error insofar as said Finding may be a Conclusion of Law because it is unsupported by the Findings of Fact and the evidence and therefore does not support

Conclusion of Law I or the Judgment against Appellants, or either of them.

3. Judgment against Appellant Glens Falls Indemnity Company cannot be predicated upon a contractual relationship between Appellee American Seating Company and Appellant Glens Falls Indemnity Company.

There is no allegation in the complaint of either an express or implied contract between Appellee and Appellant Glens Falls Indemnity Company, no evidence thereof was introduced, and Finding of Fact 6 is inadequate in this respect. Conclusion of Law I and the Judgment are therefore unsupported by the evidence and the Findings and the trial court erred insofar as the Conclusions of Law and the Judgment may be based upon an express or implied contract between said parties.

4. Judgment against Appellant Glens Falls Indemnity Company cannot be predicated upon a contractual relationship between Appellee American Seating Company and Appellant E. F. Grandy, Inc.

The performance bond and the payment bond of Appellant Glens Falls Indemnity Company related exclusively to the subcontract between V. L. Murphy, the subcontractor, and E. F. Grandy, Inc., the contractor. Any direct contractual relationship whether arising by express agreement or by implication of law between Appellee and E. F. Grandy, Inc., would be outside the scope of either of said bonds. The trial court erred in granting Judgment against Appellant Glens Falls Indemnity Company insofar as such Judgment may be based

upon a contract between Appellee and Appellant E. F. Grandy, Inc., because such a contract is outside the scope of the said bonds since it is not the contract with respect to which the contract of indemnity was furnished and Conclusion of Law I and the Judgment are unsupported by the Findings of Fact in this respect.

5. Judgment against Appellant E. F. Grandy, Inc. cannot be predicated upon a contractural relationship between Appellee and Appellant E. F. Grandy, Inc.

There is no allegation in the complaint of either an express or implied contract between Appellee and Appellant E. F. Grandy, Inc. and no evidence thereof was introduced and Finding of Fact 6 is inadequate in this respect, and Finding of Fact 7 reciting that Appellant E. F. Grandy, Inc. approved the contract between Appellee and V. L. Murphy is unsupported by the evidence. Conclusion of Law I and the Judgment are therefore unsupported by the evidence and the Findings and the trial court erred insofar as the Conclusions of Law and the Judgment may be based upon an express or implied contract between said parties.

6. The Findings of Fact and Conclusions of Law are vague and indefinite and inadequate to disclose the factual or legal basis for the Judgment and are inherently inconsistent because they cannot be interpreted in any manner which would result in joint legal liability of Appellants.

Liability must be predicated upon the bonds or either of them or upon the existence of an express

or implied contract between Appellee and Appellants or either of them. Under the first alternative Appellant E. F. Grandy, Inc. could not be liable because as already noted in points 1B and 2A said Appellant was the obligee and as such the party to be protected. The bonds created no right in favor of any party against said obligee. Under the second alternative, each party would be liable for his own contract with Appellee and such a contract was not the subject matter of either bond and outside of the scope thereof and therefore not affected by the provisions of either of said bonds in any manner. As above pointed out, neither party was obligated to Appellee by direct contract either express or implied, but any such contract could affect the contracting party only.

7. The Trial Court erred in granting judgment for interest from June 1, 1949, to date of Judgment.

Finding of Fact 7 to the effect that on the 1st day of June, 1949, Appellee furnished the goods referred to in the complaint and Finding of Fact 9 that the sum mentioned therein was due and owing to Appellee from Appellants from and after the 1st day of June, 1949, are both entirely unsupported by the evidence. It was error for the court to so find and to adopt Conclusion of Law I and grant Judgment both based upon said Findings.

8. The Findings are unsupported by the evidence in the following additional material respects:

(A) Finding of Fact 6 is unsupported by the evidence to the extent that it is therein found that Appellants, or either of them, knew that in order

for the subcontractor "V. L. Murphy to carry out his contract, it would be necessary for him to purchase and obtain supplies from plaintiff."

(B) Finding of Fact 8 is unsupported by the evidence.

(C) Finding of Fact 10 is in error in the following material respects: In every respect wherein it is hereinabove alleged that the Findings are not supported by the evidence the court further erred by not affirmatively finding that the contrary is true since in each instance the correlative allegation of the complaint was denied in the respective answers and Appellee had the burden of proof.

* * * * *

Dated: March 8, 1954.

Respectfully submitted,

McCALL & McCALL and
ALBERT LEE STEPHENS, JR.,
/s/ By ALBERT LEE STEPHENS, JR.,
Attorneys for Appellants

Affidavit of Service by Mail attached.

[Endorsed]: Filed Mar. 9, 1954. Paul P. O'Brien, Clerk.

[Title of U. S. Court of Appeals and Cause.]

STIPULATION RE PRINTING OF EXHIBITS AND ORDER

Whereas, Appellants, by and through their counsel of record, presented to the United States Court

of Appeals for the Ninth Circuit a Motion to Clarify Record on Appeal, which said motion came on regularly for hearing pursuant to due and proper notice thereof on the 5th day of April, 1954; and

Whereas, at the said time and place Appellee, by and through its counsel of record, presented to the United States Court of Appeals an Order Ex Parte Nunc Pro Tunc, copy of which is attached hereto and made a part hereof by reference, which said order was signed on the 5th day of April, 1954; and

Whereas, the Court, consisting of the Honorable Clifton Mathews, Judge presiding, the Honorable Albert Lee Stephens, present but not participating, and the Honorable Homer T. Bone, suggested that the motion be dismissed with the understanding that the exhibits referred to in the said motion and the said Order Ex Parte Nunc Pro Tunc would be considered as properly admitted in the United States District Court for all purposes of the appeal since the Honorable Ernest A. Tolin, District Judge, stated that it was an inadvertence that said exhibits were not received in evidence, although he had intended to receive the same; and

Whereas, the Court expressed a desire to refer to said exhibits in printed form rather than in their original form, if they were not lengthy;

Now, Therefore, It Is Hereby Stipulated, in compliance with the suggestions of the Court, by and between Appellants and Appellee, by and through their respective counsel of record, that an order

may be made that the following exhibits be printed in the record:

Exhibits 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 consisting of a one-page letter and attached invoice, 13, 14, 15, 16, 17, Exhibits A and C, and that the record should show in the appropriate place that Exhibit B is a Government construction contract which is too lengthy to be printed and that for this reason the same may be referred to in its original form, if required.

Dated: April 6, 1954.

McCALL & McCALL and
ALBERT LEE STEPHENS, JR.
/s/ By ALBERT LEE STEPHENS, JR.,
Attorneys for Appellants

WOLFSON & ESSEY and
IRVING H. GREEN,
/s/ By IRVING H. GREEN,
Attorneys for Appellee

ORDER

It is so ordered.

Dated: April 14, 1954.

/s/ CLIFTON MATHEWS,
/s/ HOMER T. BONE,
Judges, U. S. Court of Appeals for the Ninth Circuit

ORDER EX PARTE NUNC PRO TUNC

Good cause appearing therefor;

It Is Hereby Ordered, Adjudged and Decreed that, plaintiff's Exhibits 1, 9, 10 and 11, marked for identification, and each of them, be and the same hereby are received in evidence nunc pro tunc as of June 1, 1953.

Dated this 1st day of June, 1953.

ERNEST A. TOLIN,
Judge of the District Court

This order signed this 5th day of April, 1954 nunc pro tunc June 1, 1953, for the reason that by inadvertence the exhibits were not received in evidence. The Court mis-remembered the events at trial and failed to rule as it intended to do, that the exhibits be received.

ERNEST A. TOLIN, Judge

[Endorsed]: Filed Apr. 15, 1954. Paul P. O'Brien, Clerk.